Supreme Court, U.S
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No. ____

IN THE
SUPREME COURT OF THE UNITED STATES

TOM JENSEN, Individually and as an advocate for the rights and interests of his mother, Marguerite Jensen (now deceased), a frail elderly institutionalized person,

Petitioner

v.

SWEET HOME ONE CARE FACILITY
A business entity, et al.

On Petition for Writ of Certiorari
To the United States Court of Appeals
For the Ninth Circuit

PETITION FOR WRIT OF CERTIORARI

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Petitioner in propria persona

QUESTIONS PRESENTED

I. Did the court of appeals wrongfully fail to correct the district court's manifestly arbitrary failure to consider the issues raised by the pleadings and the evidence supporting them, and its manifestly arbitrary conclusions unsupported by the evidence in favor of moving parties that foreclosed any opportunity for Petitioner to make a showing on his claims on the summary judgment motion in this case?

II. Did the court of appeals abdicate its ethical and supervisory duties by (1) failing to correct a district court that has a record and history of failing to consider evidence and of drawing conclusions unsupported by the evidence in favor of moving parties on dispositive motions, and (2) failing to correct a manifest abuse of the federal court's process by moving parties, circumstances that are certain to recur and prejudice other parties if not corrected?

III. Should this court make it clear that the arbitrary conduct by the district court and the abuse of the federal court's procedure by the moving parties in this case that foreclosed any opportunity for Petitioner to make a showing on his claims discredits the Federal Courts and the Federal Bar and is unacceptable practice in the federal court system?

PARTIES TO THE PROCEEDINGS BELOW

Petitioner/Plaintiff

Tom Jensen.

Defendants

Sweet Home One Care Facility, a business entity; Minerva Mostrales, Soledad Almocera ("Sweet Home defendants").

California Health and Welfare Agency (currently known as the California Health and Human Services Agency), California Department of Social Services, Community Care Licensing Div., public entities; Elaine Arrington, Anita Gopaul, Martha Lopez ("State defendants").

Kaiser Permanente Medical Offices – Milpitas (a.k.a. Kaiser Permanente Medical Group, Inc., Kaiser Foundation Health Plan, Kaiser Foundation Hospitals) business entities; Bill Jue MD ("Kaiser defendants").

Peter Jensen, Beth Wells ("Jensen/Wells").

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PETITION FOR WRIT OF CERTIORARI

Tom Jensen for himself and as an advocate for the rights and interests of his mother Marguerite Jensen, a frail elderly institutionalized person (now deceased), respectfully petitions for a writ of certiorari to review the judgment of the U.S. Court of Appeals for the Ninth Circuit.

OPINIONS BELOW

The May 18, 2006 decision of the U.S. Court of Appeals for the Ninth Circuit is reproduced at App.1. The January 31, 2005 decision of the U.S. District Court for the Northern District of California granting defendants' summary judgment motions is reproduced at App.7.

JURISDICTION

This Court has jurisdiction over the Petition for Certiorari pursuant to 28 U.S.C. § 1254(1) and Rules 13.1 and 13.3 of this Court. This is a petition for review of a decision of the U.S. Court of Appeals, Ninth Circuit filed on May 18, 2006. On June 1, 2006 Petitioner filed a timely petition for rehearing and for rehearing en banc of that decision, which was denied by an order filed on July 21, 2006.

RELEVANT CONSTITUTIONAL, STATUTORY, AND REGULATORY PROVISIONS

The relevant constitutional, statutory, and regulatory provisions are reproduced in the Appendix at App.39-46.

STATEMENT OF THE CASE

A. Facts supporting Petitioner's Claims and Facts Related to the Questions Presented

In the Fall of 1989 Petitioner had a sudden devastating illness characterized by malaise, profound fatigue, and significant cognitive impairment. Several months after the onset of his illness, Petitioner received a medical diagnosis of "chronic fatigue post-viral syndrome." Several years later he

also received a medical diagnosis of "chemical sensitivity." App.94 (Pt's declaration ¶¶ 8-14). Doc # 345, Ex.B-2, 4, and 5; Doc # 360 at ¶¶ 4, 5, 7, and Excerpts of Record, V.1 (ER), pgs.153-161 (Pt's declarations and medical records).

After his initial illness, Petitioner suffered frequent severe exacerbations of his symptoms for a period of many years. During severe exacerbations, Petitioner would suffer debilitating malaise and pain, and would sometimes become marginally coherent, could not read or remember what he had read, could not alphabetize or do simple arithmetic, became uncoordinated, and his speech would become slurred. Id.

Eventually, Petitioner discovered several non-prescription medications that would moderate his severe symptoms, and acquired enough knowledge and experience to understand and manage his illness by avoiding food and chemical triggers, by antibiotic treatment, by curtailing his physical activities, and by rest and recuperation. The original symptoms still continue as do daily exacerbations, but Petitioner is now able to manage to avoid severe exacerbations of them. Id.

Defendants Jensen/Wells, Petitioner's siblings who were responsible for Petitioner's mother's care, had negative and inappropriate reactions to Petitioner's illness and symptom expression which led to his necessary estrangement from them. Id. Petitioner would not have become involved in the circumstances of the neglect of his mother's personal and health care, but for his mother's entreaties to him, her evident sense of desperate need, Petitioner's sense of duty to her, and because Jensen/Wells reactions to Petitioner's health problems informed Petitioner to be concerned that they lacked competence to care for her. In coming to the aid of his mother, Petitioner significantly compromised his personal and health needs. App.95 (¶14)[1]

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[1] Instead of properly treating this evidence as "correct," *Kodak* infra, the court's unsupported "opinion" was that Petitioner's motivation was his purported "vengeance" against his siblings. App.37 (see bold text).

In 1997, while under the care of defendants Jue and Jensen/Wells, Petitioner's father developed a urinary tract infection (UTI) that wasn't diagnosed and treated until it involved his kidneys and became acute, requiring his hospitalization. He died some months later. Before he was hospitalized, Petitioner noticed that his father developed cognitive impairments that weren't normal for him. After his mother became ill Petitioner used this information, and his mother's similar cognitive deterioration to inform him of his mother's health care needs. SAC ¶15 [2] (find SAC at App.47-93). App.100 (text of Pt's verified handwritten letter to Jue alleged in SAC ¶31). ER 46 (excerpt from Pt's verified handwritten letter alleged in ¶ 32).

In the Spring of 1998, after his father died, Petitioner's mother on her own initiative made repeated complaints to him about the circumstances of her care. In order to ameliorate her expressed sense of loneliness and abandonment by her family, Petitioner visited her frequently and regularly during 1998. App.96-97 (Pt's declaration ¶¶5-6). SAC ¶¶11-12, 42, 68-70. Doc # 345, Ex.B-2 at pg.7, and Doc # 359 at ¶¶5-6 (Pt's declarations). Petitioner's mother was hospitalized on 7/9/98 for a broken hip, and was treated at the hospital after surgery for a hospital acquired UTI. Doc # 349, Ex.B, pg.A-18 (Hospital record).

Petitioner's mother suffered a serious deterioration of her health in the winter of 1999 while she resided at Sweet Home that was not reported to or treated by his mother's doctor, Kaiser defendant Dr. Jue. SAC ¶¶13-15. App.97-98 (¶¶ 7-8 of Pt's declaration). App.137(S.H.'s admission of Pt.'s mother's deterioration). App.120-21 (Pt's verified 9/3/99 letter to Jue describing course of illness). Over a period of

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[2] Petitioner verified ¶¶ 11-74 of the SAC (same in FAC), and his handwritten documents submitted as evidence, in his declaration in support of his opposition, making them an "affidavit" for purposes of Rule 56(e). Doc # 343 (Pt's declaration). See *Jones v. Blanas,* 393 F.3d 918 (9th Cir. 2004)(citing cases). ¶¶ 11-74 were also verified by other declarations in the S. J. record. E.g. Doc ## 345, Ex.B-1; 376 at ¶5.

time Petitioner observed Sweet Home's neglect of his mother's personal care. SAC ¶¶14-22. Petitioner reported the deterioration of his mother's health and Sweet Home's neglect of her personal care to Kaiser defendants and to Jensen/Wells in the spring of 1999. SAC ¶¶ 23, 30-34 (Kaiser/Jue), 35 (Jensen/Wells).

Petitioner made two visits with his mother to Jue seeking diagnosis and treatment for his mother's deteriorated health. SAC ¶24. ER 44-45, 73 (med. records of 4/16/99 and 5/27/99 visits). At the first visit Jue did a urinalysis for his mother which returned positive for infection with Klebsiela pneumonia bacteria. ER 45. On 5/26/99 Petitioner sent a letter to Jue reporting his mother's signs and symptoms of diminished cognitive abilities and lower abdominal tenderness, suggested to him that she suffered from UTI and advocated for its treatment, and mentioned that his father's UTI had been allowed to become acute requiring admission to the hospital, and that he didn't want that to happen to his mother. SAC ¶31, App.99-100. Attached to the letter was Kaiser's "Self Care Tips" for urinary tract infection stating, inter alia, that "discomfort in the lower abdomen" is an "early symptom" of UTI, that the unsanitary post-toilet cleaning practices by Sweet Home he observed and reported to Jue were risk factors for UTI, and that untreated infections may spread to the kidneys. App.101 –102 (Self Care Tips).

The second visit to Jue on 5/27/99 occurred after Petitioner's mother coughed up a large y-shaped mucous plug from her lungs which she had saved in a tissue for Petitioner to inspect. SAC ¶¶15, 26. App.108-109 (Pt's deposition). Jue did not offer a diagnosis or any treatment for his mother at these visits. SAC ¶24.

Jensen/Wells responded to Petitioner's reports to them and to Jue of the neglect of his mother by Sweet Home with malice instead of concern, stating their state of mind in a 6/7/99 e-mail of, inter alia, "I have had it with him jerking me (us) around," App.110-11 (text of e-mail), and flatly denied his reports at a meeting with Petitioner. SAC ¶35.

Jensen/Wells also entered into an agreement with Jue that Jue would "not communicate with Mr. Jensen further regarding Marguerite's health care," ER 54(declaration of Jue),[3] and sent a letter to Petitioner on 6/24/99 stating, inter alia, that his conduct "had become unacceptable." SAC ¶37. Doc # 341(Pt), Ex.A at 11 (Jensen/Wells' letter).

On 6/24/99, Petitioner sent a letter to Jue, the Kaiser Patient representative, and to Jensen/Wells asking Kaiser to take remedial action for his mother, and asking that Kaiser "counsel" Wells regarding her "responsibility to ensure quality of care." ER 47 and 76. App.112-13 (text of Pt's verified handwritten cover letter to Jue in which he reported the incident described in ¶19 of the SAC). Kaiser defendants never responded to this or the previous letter Petitioner sent to Jue. SAC ¶30. On 8/15/99 Jensen/Wells sent a letter to Petitioner stating, inter alia, "you have totally alienated [Wells] from you... and also alienated the people at Kaiser [ ] and at Sweet Home." SAC ¶ 38. ER 77 (Jensen/Wells' 8/15/99 letter).

After Petitioner's mother expelled her mucous plug, she began to cough up large quantities of clear then purulent mucous. Petitioner's mother expressed her concern to him about the purulent mucous. App.114-15 (text of Pt's verified handwritten audio tape transcript). Since defendant Jue had been unresponsive to Petitioner's reports of his mother's symptoms, Petitioner took his mother to Dr. Derek Jue of Washington Newark Medical Group on 7/8/99. Petitioner brought a sample of his mother's purulent sputum to the doctor for him to inspect. App.116 (text of 9/13/99 letter from Derek Jue faxed to Petitioner), ER 7-8(medical

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[3] This is an admitted act of agreement to bar Petitioner from access to Kaiser services for his mother alleged in the SAC at ¶104. Jensen/Wells' letter, as well as all the other adverse actions taken in close proximity of time to Petitioner's reports of the neglect of his mother, if properly treated in the light favorable to Petitioner, are evidence of the parties' retaliatory or discriminatory motive and intent. *Keyser v. Sacramento City Unified School Dist.*, 265 F.3d 741, 751-52 (9th Cir. 2001).

records). Derek Jue diagnosed her with "bronchitis" and prescribed antibiotics, which were never administered. SAC ¶ 27. App.120-21 (Pt's verified 9/3/99 letter to Jue). Derek Jue's diagnosis was based on her "suspicious chest x-ray, the physical exam, and the history of the illness."

On 8/20/99 Petitioner witnessed his mother's outburst of irritation at Sweet Home staff over denial of her prescribed prn (taken as needed) symptom relieving asthma medication and recorded his mother's explanation of it. App.117-19 (text of Pt's verified handwritten audio tape transcript).[4] And see App.136 (S.H.'s admission that Pt's mother was denied access to her prn medication when she needed it and was irritated about it).

On the basis of Derek Jue's diagnosis and on the fact that his mother improved after the purulent mucous was cleared from her lungs, Petitioner believed that her mucous plugging and bronchitis had been the cause of her deteriorated health and her continuing symptoms. Accordingly, on 9/3/99 Petitioner wrote his third letter to Kaiser defendant Jue reporting his mother's history of illness and Derek Jue's diagnosis of his mother's bronchitis, and stated his concerns and his hope that "you [ ] are willing to cooperate in resolving them." App.120-123 (text of Pt's handwritten letter). Jue did not respond to this letter. SAC ¶ 30. Instead, Jue filed an "Unusual Occurrence Report" with his Kaiser defendant employer on 9/9/99 stating that Petitioner "recently mailed another letter of a litany of concerns ... I am concerned about his persistent behavior and feel somewhat uneasy and threatened" and asking "can we place a patient alert re this." ER 99-101. Mostrales admitted to communicating by telephone with Wells on 9/8/99 concerning

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[4] Due to Petitioner's mother cognitive impairments she generally could not answer direct questions related to her care, but she could remember past events related to what was on her mind at the time. Doc # 345, Ex.B-2 at pg.6 (Pt.'s declaration). Doc # 335(S.D.), Ex.C at 71 (Pt.'s deposition).

Wells' knowledge of Petitioner's letter to Jue and Jue's response to it, stating that Wells reported to her, inter alia, that "Kaiser has legal action regarding Tom," and admitted, inter alia, Mostrales' state of mind that Petitioner's reports to Kaiser were "unacceptable behavior" creating "troubles [] for [] my facility." App.124 (text of Mostrales' diary entry). On 9/9/99 Jensen/Wells sent Petitioner a letter from Jensen's San Diego residence stating, inter alia, "you have taken her on at least one unauthorized medical visit. ...You are not to take her for any medical visits." SAC ¶39. ER 92 (letter).

On 10/13/99, Petitioner took his mother to Derek Jue because she was showing signs of severe breathing distress and because she had received no treatment for her bronchitis. SAC ¶ 40. Doc # 330(SH), Ex.2 at 177 (Pt's deposition.). Sweet Home defendant Mostrales, who had been called by the caregiver to intervene, admitted her state of mind that Petitioner "is ...paranoid and mentally ... sick himself not his mother."[5] App.125 (Mostrales' diary entry).[6] On 10/16/99 Jensen/Wells sent a letter to Petitioner stating that he was "denied further access to Sweet Home." SAC ¶41, ER 105.

On 11/5/99 petitioner reported the neglect of his mother's personal and health care and the retaliatory actions of interference and reprisal in response to his reports taken against him by Sweet Home and Jensen/Wells to State defendant Gopaul. Petitioner submitted to Gopaul a "detailed [hand] written report containing documentation and evidence of the neglect of his mother and the untreated episode of illness he observed." SAC ¶¶43, 52. The report contained, inter alia, Petitioner's observations of the neglect of his mother contained in SAC ¶¶14-23, an account of his health

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[5] See SAC ¶ 47 (Ombudsman states in close proximity in time to Mostrales that Pt is "paranoid" and refers him to mental health facility).

[6] Mostrales was an admitted full time Kaiser employee, and except for this incident has no personal knowledge of Petitioner's activities at Sweet Home. No witness in this action besides Petitioner has personal knowledge of what occurred at Sweet Home. ER 91 at ¶4, ER 187 at 6, Doc # 345, Ex.B-2 at pgs.5-6 (Pt's declarations).

problems and Jensen/wells' inappropriate reactions to them, ER 153-54, and the documents at App.99-102 and 112-123.

On the same day Petitioner filed his report with Gopaul, Petitioner's mother stated to Gopaul that "she wanted her son Tom to visit." App.126 (text of Gopaul's Detail Supportive Information).[7] SAC ¶¶10, 42. See App.43-44 (Cal.Prob. Code § 4270). State defendants conducted an investigation, but the investigation was not of Petitioner's report of Sweet Home's neglect of his mother's personal and health care. Instead it was a "confidential" investigation of allegations against Petitioner Sweet Home and Jensen/Wells had made to State defendants in response to his report to State defendants. SAC ¶53. App.127(Gopaul's 12/2/99 fax to Petitioner)[8] These allegations included Jensen/Wells'11/22/99 letter to State defendants stating that Jensen/Wells believed Petitioner was "mentally unbalanced," SAC, Ex.C-1(App.90), Wells' hearsay and opinion that he was "disruptive and mentally unbalanced."[9] ER 117 (Gopaul's 11/18/99 Detail Supportive information). By inference it also included Sweet Home's admissions of statements Mostrales had made that defendants agreed, inter alia, that Petitioner's reports of Sweet Home's neglect of his mother's personal and health care were "prompted" by Petitioner's "mental and personal behavioral problems," SAC Ex.C-1, 2,[10] App.124-25(Mostrales' diary),

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[7] Gopaul did not read Petitioner's report. SAC ¶¶56-57. And see note four.

[8] The fax is not a copy of the original, ER 184 (Pt's declaration), giving rise to the inference that documents related to the confidential investigation were spoiliated). See note 20.

[9] In their 11/29/99 telephone communication, Jensen/Wells stated to Gopaul "the letter was on the way," and Gopaul "asked directly about our barring Tom from the facility, but seemed to understand my explanation." ER 167 (11/22/99 fax of Jensen/Wells).

[10] Treated in the light favorable to Petitioner, Sweet Home's statements are an admission of Sweet Home's part in advocacy for and agreement to barring Petitioner from the Sweet Home facility, and from access to Kaiser facilities and services for his mother. SAC ¶¶88, 90, 91(d), and 104.

and the Ombudsman's statement that Petitioner was "paranoid," based by inference on statements Jensen/Wells and Sweet Home made to them. SAC ¶47(see note 5 and related text). ER 6 (evidence of communication between Ombudsman and State defendants).[11]

In a 1/28/00 meeting with Petitioner, scheduled after much delay and in response to Petitioner's repeated objections to his being barred from Sweet Home, Sac ¶¶54-55, ER 87, 112 (Pt's verified handwritten letters to State defendants), State defendants stated to him their belief that he had caused "turmoil at Kaiser," and announced their decision that they intended to impose visitation restrictions on his access to Sweet Home and to association with his mother. SAC ¶¶59-60. In response to Petitioner's inquiry, State defendants admitted they had not read Petitioner's detailed report containing documentation and evidence of the neglect of his mother's personal and health care before reaching their conclusions. SAC ¶56. After making this admission, the State defendants agreed to do a new investigation within "10 days." SAC ¶58. App.43 (Cal.H.& S.Code §1569.35).

The State defendants, however, did not initiate the second investigation until shortly after the office of State Senator Liz Figueroa intervened at Petitioner's request. SAC ¶63. ER 121-22 (Pt's 2/21/00 letter to Arrington). App.128 (text of Arrington's 3/29/00 letter stating investigation will be "completed by 3-10-2000" faxed to Petitioner by the office of Senator Figueroa on 03/06/00).

During the "new" investigation, proposed visitation restrictions for Petitioner were concurrently discussed among State and Sweet Home defendants and Jensen/Wells, indicating that the "new" investigation was merely pro forma and a sham. Jensen/Wells' 3/1/00 e-mail, App.129, mentions

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[11] The Ombudsman refused to respond to Petitioner's subpoena, and the district court refused to respond to Petitioner's request to order them to do so. ER 164-65. And see note 20 (State defendants produced no results of their "confidential" investigation in spite of court order).

State defendants' previously decided plan of imposing visitation restrictions, and Jensen/Wells stated "[t]he rules would, I think, be pretty much what we asked for before." On 3/5/00 Jensen/Wells communicated with Sweet Home pursuant to agreement to terms and conditions of the visitation restrictions. App.130. On 3/7/00, the Complaint Investigation Report was signed by Gopaul and Sweet Home allowing "15 days" to submit a "plan – outlining the visitation." ER 138. The "plan" dated 3/10/00 is the "Visitation Restrictions for Tom Jensen" at SAC, Ex.A, pg.2.

After receiving the Visitation Restrictions for Tom Jensen from Sweet Home on 3/13/00, on 3/14/00 State defendants contacted Janet McKenzie, "staff attorney" of the Department of Social Services seeking her approval of them. ER 142 (McKenzie fax # in header of visitation restrictions), ER 144, 145 (Jensen/ Wells' e-mails). App.150 (S.D.'s admission of 3/16/00 phone call between Gopaul and McKenzie).[12] On 3/16/99 McKenzie called Jensen/Wells at Gopaul's request and "[s]he over and over strongly recommended that we get the Conservatorship done ASAP. She said a Restraining Order could be walked through in 1 day." ER 145 (Jensen/Wells' 3/16/99 e-mail). On 3/20/00 Jensen/Wells faxed McKenzie, ER 147, explaining that they had been advised by their attorneys not to pursue an R.O. "because if we were to persist and lose,, it would damage our case for a Conservatorship," and proposed effectively the same restrictions submitted by Mostales, and that State defendants present them to Petitioner. On 3/20/00 McKenzie faxed a response to Jensen/Wells, App.131-32, stating, inter alia, that State defendants would not authorize Sweet Home "to do anything that is contrary to your mother's personal

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[12] The district court ignored Petitioner's request to order production of McKenzie's documents. App.149-153. See notes 11and 20. The Court also misrepresented the Jensen/Wells e-mails as reporting conversations with "*employees* of DSS and Licensing Div." App. 18. The e-mails in fact reported on Jensen/Wells' *multiple* conversations with Gopaul and Arrington. See e.g ER 134, 136, 143, 144, 150.

rights" without a court order, and that visitation restrictions could not be legally presented to Petitioner by State defendants "even if they were legally enforceable."

Contrary to McKenzie's advice, the visitation restrictions were presented to petitioner by fax by State defendant Arrington on 4/3/00.[13] SAC ¶¶65-66, Ex.A, pg.1. Also contrary to McKenzie's advice, the visitation restrictions violated Cal. Code of Regs. Title 22, § 87572(a)(6) and (11) prohibiting interference with Petitioner and his mother meeting in private during regular visiting hours and leaving the facility at any time. App.44. The visitation restrictions also stated "Done in compliance with the directions and advice of Anita Gopaul, LPA and Elaine Arrington, LPS of Community Care Licensing."[14] SAC Ex.C-2. In the meantime, Petitioner had remained admittedly unlawfully barred from the Sweet Home facility and from association with his mother against her express wishes during the delayed five month course of the investigation.

Petitioner did not visit his mother after the restrictions were imposed because, inter alia, the defendants' pattern of conduct and the results of the investigation appeared so irrational and threatening to Petitioner that he feared for his personal security if he appeared at Sweet Home. SAC ¶¶91(c), 106(b), (c). Doc # 330(S.H.) Ex.2 at 250 (Pt.'s depo.). Petitioner also feared for his mother's life due to the neglect of her health care, and gave priority to legal research for a remedy for her which became a request in the complaint for injunctive relief. FAC ¶¶111-112, Doc # 3. Therefore, unknown to Petitioner until discovery, 2 weeks after the restrictions were imposed on 4/3/00, and a year after petitioner first reported his mother's signs and symptoms of

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[13] This fact was materially misrepresented and misstated by the district court in its S.J. Order by its erroneous statement that Sweet Home faxed it to Petitioner. See bold text at App.18, and see App.83

[14] This fact was materially misrepresented and misstated by the district court by its substitution of "DSS employees" for defendants Arrington and Gopaul. See bold text at App.19. And see App.85

UTI, Petitioner's mother was admitted to the hospital on 4/19/00 with acute pyelonephritis (kidney infection) with right staghorn calculus (infected kidney stone), bacteremia and "probable sepsis" with Klebsiela pneumonia, the same bacteria Jue found a year earlier in her urine, and dysphagia. ER 45 (Jue's 4/21/99 patient progress record). ER 48-50 (Hospital Transfer Summary). App.133-34 (pg.3 of Summary). Kaiser's documents and moving papers admit that the abdominal tenderness Petitioner reported his mother suffered from in his 5/26/99 letter to Jue is a symptom of UTI that justified antibiotic treatment before the infection became acute, admits that UTI's are "especially dangerous for older people," and admits that if not treated, UTI's "may spread to the kidneys and cause more serious problems." App.101(Kaiser "Self-Care Tips"). App.135 (Kaiser's Ex.D at 4).

On 3/6/00 the day before the Complaint Investigation Report was signed, and less than 6 weeks before Petitioner's mother was admitted to the hospital, Sweet Home wrote a letter admitting Petitioner's mother's condition had progressively deteriorated from the time Petitioner first observed and reported it, and had "recently" significantly deteriorated. App.137 (Sweet Home letter). But neither Sweet Home nor State defendants, who were supposedly investigating Petitioner's report of the neglect of his mother's personal and health care at that time, did anything about it. Even when her need for medical evaluation and treatment had become clearly obvious. By the time Petitioner's mother was belatedly admitted to the hospital for treatment her "prognosis was poor," ER 52 (hospital record), and she died soon after on 5/19/00. ER 53 (death certificate).

B. Procedural History in District Court before Summary Judgment and Facts Related to the Questions Presented

On 9/11/00 Petitioner filed suit, stating four claims in the FAC filed 10/10/00, and asking for injunctive and declaratory

relief. The verified facts of the FAC are the same as in the SAC.

Defendants filed Rule 12(b)(6) motions to dismiss. However, instead of deeming Petitioner's allegations as admitted and assuming the burden of proving on that basis that no claim was stated, State and Sweet Home defendants alleged purported facts outside the pleadings that turned their motions to dismiss into a contest between their version of the facts alleged in their motions and the facts alleged in Petitioner's complaint.[15] State and Sweet home defendants failed to admit to the pleaded neglect of petitioner's mother's personal and health care and Petitioner's pleaded agreement between State and Sweet Home defendants to impose unlawful visitation restrictions "without just cause, and in retaliation for his reports of the neglect of his mother," FAC ¶87. State defendants stated, inter alia, that "There is no question that the restrictions imposed were reasonable." Doc # 9 at 7. Sweet Home argued, inter alia, that Petitioner had "no constitutionally-protected right to speak at or assemble on the premises of Sweet Home," citing *Hudgens v. NLRB*, 424 US 507 (1972),[16] Doc # 9 at 5 and 7. The district court granted defendants' motions to dismiss. Doc # 73, and Petitioner appealed.

The dispositive issue of error on appeal was the failure of the district court to treat the factual allegations of the complaint as true and draw all reasonable inferences in the plaintiff's favor. Petitioner argued in his Reply Brief at 10 that, as opposed to the defendants' version of the facts, "the actual facts and circumstances show that elder abuse,

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[15] *Jenkins v. McKeithen*, 395 U.S. 411, 421 (1965) ("allegations of the complaint are taken as admitted").

[16] The *Hudgen's* factual context has no relationship to Petitioner's 1st Amendment claims because, inter alia, the claims involved speech that did not occur on Sweet Home's "private property." Moreover, Sweet Home was Petitioner's mother's *home*, she had a *private* room, and state regulations *required* that she be allowed to meet with Petitioner in *private*. App.44 (Cal. Code of Regs., Title 22, § 87572(a)(6) and (11)).

fraudulent and pretextual allegations, a grossly negligent investigation, and other misconduct by state and private defendants occurred; resulting in visitation restrictions that were constitutional deprivations, **not** genuine restrictions. Accepting the factual allegations of the complaint as true, the visitation restrictions are unreasonable ..." (emphasis in original). The Court of Appeals reversed and remanded on Petitioner's "section 1983 claim based on the visitation restriction" stating that private defendants as state actors "could not unreasonably restrict his 1st and 14th Amendment rights," and that Petitioner had alleged as a fact supporting his claims that defendant Jensen had falsely accused him of being disruptive that the district court had improperly relied on for the truth of the allegation.[17] ER 1.

On remand, State and Sweet Home defendants stated in their case management statement contentions that "issues relating to his mother's health or care are no longer relevant," ER 3, and proposed at the conference, to submit to the court for its consideration without briefing, Petitioner's complaint redacted of, inter alia, Petitioner's allegations of the neglect of his mother's personal and health care. App.138-39 (text of pgs. 8-10 of transcript of conference). Over Petitioner's vigorous objections, the court agreed to the substance of this proposal. After exhausting efforts in opposition to this proposal, Petitioner filed a motion for recusal for what appeared to be the district court's continuing predisposition favoring defendants' version of the facts. The motion was granted. Doc # 182.

Immediately after reassignment, and before a case management conference had been held, Sweet Home opened discovery with a document request. Petitioner objected to opening discovery before the disputed issues of relevancy

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[17] It is notable that defendant Jensen's allegation of "disruption" is at best hearsay from Mostrales based on hearsay from Sweet Home staff. considered in the light favorable to Petitioner it is a pretext for retaliation or discrimination. See notes 3 and 6.

were settled. Also immediately after reassignment, on 3/25/03, Petitioner filed a motion to amend, Doc # 196. After Petitioner filed his motion, State defendants filed a second motion to dismiss the FAC, Doc # 216, claiming absolute prosecutorial and qualified immunity wholly based on assumed facts outside the pleadings. State defendants' claim of prosecutorial immunity was an effective admission that petitioner was denied the procedural process that was due. Accordingly, Petitioner moved for summary judgment on his procedural due process claim. FAC ¶ 87/[SAC ¶89] (visitation restrictions were imposed [and the investigation deliberately delayed] "without notice to the plaintiff, without a hearing, without a right of appeal, [and] without valid legal authority ..."). The district court denied both motions. Doc # 248 (7/29/03 Order).

Petitioner moved to file the second amended complaint to preempt further attempts to redact and misrepresent the issues raised by the pleadings by, inter alia, alleging with more particularity in Claim I the violation of his rights of free speech and association.[18] Petitioner also added Claim II, and defendants Peter Jensen and Beth Wells as co-conspirator parties to Claim I, based on the existing evidence of retaliation alleged in the SAC, and discovered information that they and the other defendants had discussed among themselves and had stated to State defendants that Petitioner was "mentally unstable," and "mentally ill." These facts and other evidence eventually produced raised the justifiable inference that these allegations, and erroneous assumptions and inappropriate reactions based on them were a motivating factor for the defendants' challenged actions. SAC, Ex.C.

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[18] Petitioner added "[violation of] plaintiff's right to advocate for correction of neglect of his mother's personal and health care and violation of her personal rights" to SAC ¶ 96, and alleged that State defendants' custom and policy "subjected plaintiff to an unreasonable risk that he would suffer from retaliation without remedy for reporting [the neglect of his mother's care]." SAC ¶92. See also SAC ¶85, and Ex.B. But see App.26-7 (the district court failed to consider these issues).

The reassigned court granted Petitioner's motion to amend as to State, Sweet Home, and Kaiser defendants, but denied it as to Jensen/Wells. Doc ## 224, 248. In their opposition to Petitioner's TAC that contained the same and additional allegations of Jensen/Wells' retaliatory and discriminatory motive and intent as in SAC ¶¶ 90 and 104 (b) and (c), Jensen/Wells stated "The gist of Plaintiff's allegations against Family Defendants is their purported communications with the other defendants regarding their concerns as to Plaintiff's conduct which they believed to be disruptive and detrimental to the peace and proper care of their mother." ER 195 (pg. 7 of Jensen/Wells' motion). Just as the district court had previously done before reassignment, the reassigned court ignored and failed to consider the issue raised by the pleadings of Jensen/Wells' false allegations made pursuant to improper motives and intent as corruptly influencing the State defendants' decision. The court decided, in spite of Petitioner's pleadings, that Jensen/Wells' "merely expressed their views to state officials in the hope that they would agree" and that "the ultimate decision distinctly remained with public officials."[19] App.3-4 (text of pg.18 of court order). Later discovered evidence of Jensen/Wells' state of mind discredited the court's presumption of Jensen/Wells' good faith. App.110-11 (Jensen/Wells' 6/7/99 e-mail).

The case management conference did not occur until after the foregoing and other motions were briefed or decided. In the meantime, Petitioner had to deal with deficient responses to his discovery requests first initiated by Petitioner on 3/6/03, because defendants' version of the facts determined what documents and information they decided were relevant, and defendants did not fulfil the requirements of Rules 26(a)(1) or (b)(5). When the case management conference

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[19] The court used the purported "genuine concern" of Jensen/Wells in support of its decision granting defendants' motions for summary judgment. App.35 and 37 (see bold text)

was finally held, on 9/30/03, the court was only concerned with setting case management dates in spite of the contentious nature of the case management statement. Doc # 252. The court provided no meaningful opportunity to discuss and settle the issues, leaving them to the defendants to unilaterally decide. Absent his requested relief from the court, Petitioner filed a motion to compel discovery on 11/3/03 which was denied in part and granted in part by a magistrate judge. Doc # 262 (motion), # 291 (Order). [20]

Kaiser defendants, like State and Sweet Home defendants before them on the FAC, did not timely file an answer, and when they did on 2/18/04, Doc # 294, they failed to answer many allegations of the complaint and denied others that they should have admitted. Kaiser defendants produced only two documents in spite of Petitioner's prodigious efforts at meet and confer, did not ever produce a privilege log as required by the case management order, and did not comply with their initial disclosure obligations. Petitioner had to ask for the subjects of the information of Kaiser's witnesses by interrogatory, and at the late date of 7/28/04 Kaiser admitted they had "not completed discovery yet."[21] App.140-41 (text of Kaiser interrogatory responses). App.144 (Text of Pt's Standing Order 2 letter re Kaiser. See ¶1). Accordingly, Petitioner made a motion to strike Kaiser defendants' answer on 3/9/04, and a motion for discovery sanctions on 3/26/04. Doc ## 295, 302. Kaiser defendants responded not by motion, but by a letter on 4/12/04. App.142-43 (text of letter). In response to Kaiser's letter, the court "terminated"

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[20] State defendants were ordered to produce "findings of fact or determinations" for their decision to approve and impose the visitation restrictions, Order at 2, which they never did do. See note 8. Sweet Home defendants produced over 300 documents and a privilege log it had not previously produced before the motion to compel was filed.

[21] Petitioner's first document request was submitted to Kaiser on 8/29/03. *Carmona v. Toledo*, 215 F.3d 124, 133 (1st Cir. 2000) ([moving party] defendants may not be permitted to "stonewall" plaintiff's discovery to obtain an unfair advantage on summary judgment).

Petitioner's motions without briefing, App.5 (4/27/04 Order), and subsequently refused to respond to Petitioner's Standing Order 2 letters asking for the court's assistance in settling the outstanding discovery disputes with Kaiser and State defendants, and the Ombudsman on issues raised by the pleadings. App.144-48, 149-53 (text of Standing Order 2 letters re Kaiser and State defendants). ER 164-65 (re ombudsman).

The court's conduct left the factual and legal issues, and the documents and information defendants would provide up to the defendants to unilaterally decide, with the result that Petitioner was prejudiced by denial of access to material evidence and denial of proper identification of the material factual and legal issues raised by the pleadings for summary judgment purposes. [22]

C. Proceedings on Summary Judgment and Facts Related to the Questions Presented

Each set of defendants made a summary judgment motion for a total of three, and Petitioner moved for reconsideration of his previously made motion for summary judgment for violation of his procedural due process rights, Doc # 338, and for reconsideration of his motions to strike Kaiser defendants' answer and for discovery sanctions. Doc # 336. The number of motions and the short time Petitioner had to respond to them was a significant issue of oppression and prejudice to Petitioner. ER 38 (Pt.'s declaration stating, inter alia "I could not examine all of the arguments and evidence presented [by moving parties] because I did not have the time to do so" in spite of working full time preparing his papers)

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[22] The foregoing facts and evidence expose the court's disingenuous misrepresentations in its S.J.Order of supposed "insignificant motions" which were in fact significant and related to obstruction of Petitioner's discovery, and of Petitioner's supposed "ample opportunity to pursue discovery" which in fact was not ample in regard to discovery on the issues raised by the pleadings. App.11 and 15 (see bold text).

The court decided that State defendants were entitled to qualified immunity on the basis that Petitioner's activities he testified to at his deposition were purportedly a threat "of potential abuse" to his mother, and therefore justified State defendants' challenged actions. App.30-31 (see bold text). This decision was implicitly the basis of the court's whole judgment as to all defendants and all claims.

The court's conclusion depended on taking Petitioner's deposition testimony out of its pleaded and testified to context of his investigation, observation and reports of the neglect of his mother's personal and health care and retaliation or discrimination against him for reporting it. As for the pleaded context, the court stated it did not consider Petitioner's pleaded verified facts that established the material factual context, because verification of the complaint is "a process foreign to the court" and did not satisfy Rule 56(e). App.31, 32, 34(see bold text). But see note 2 (citation to authority that verification of complaint satisfies Rule 56(e)). The court also demonstrated that it did not consider the pleadings for the material issues they raised, nor the evidence in the record that supported them.

The court's conclusion that Petitioner's conduct was a threat to his mother was based on the following "facts" taken out of their material pleaded, evidenced, and testified to context:[23]

(1) Petitioner's having "changed his mother's diapers," but the court failed to mention the material undisputed facts that Petitioner "changed" his mother's diapers because he suspected that she was left sitting in wet diapers and found that she was and reported the fact to Jue and Jensen/Wells who mentioned it to Sweet Home. Section A, pgs. 3-5 supra.

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[23] Petitioner's reports to State defendants, if given credit, would have resulted in citations against Sweet Home and relief for Petitioner's mother, instead of visitation restrictions for Petitioner and his being barred from Sweet Home for 5 months. See App.44-46 (regulations Sweet Home violated)

App.103 (text of pgs.91-92 of Petitioner's deposition cited by court at App.31).

(2) Petitioner's having "inspected his mother's anal and [genital] areas," but the court failed to mention the material undisputed fact that he testified to in his deposition that he checked these areas when he changed his mother's diapers and found them grossly unclean with fecal matter, which was one of the subjects of Petitioner's reports of the neglect of his mother's personal and health care, and a risk factor for UTI. App.100, 102 (letter to Jue). App.105 (text of Petitioner's deposition at 108-109 relied on but not cited by court. The relevant pg.10 describing the fecal matter petitioner saw in the crease between his mother's leg and pelvis (groin) was self-servingly left out of Ex.C by State defendants). See note 23. And see *Goka v. Bobbit*, 862 F.2d 646, 650 (7th Cir. 1988).

(3) Petitioner having checked the "volume, and odor and appearance" of his mother's urine, but the court failed to mention the material undisputed facts that volume, odor and color of urine can indicate urinary tract infection, that petitioner's mother had a history of a hospital acquired urinary tract infection justifying his concern, that petitioner's father's urinary tract infection had been neglected until it had become acute, that petitioner's mother was being left sitting in wet diapers, that her anal and genital areas were filthy with fecal matter, that petitioner's mother's health had suddenly and seriously deteriorated and she was receiving no medical care for it, and that Petitioner's mother ultimately died from a urinary tract infection a year after Petitioner reported her deteriorated health and her symptom of UTI of lower abdominal tenderness and advocated for its treatment. Section A supra at pgs.3-6. App.106 (text of pgs.102-03 of Pt's deposition cited by court).

(4) Petitioner's having taken his mother "to doctor visits that were not authorized by his siblings," having "kept a sample of his mother's 'purulent' mucous she had coughed up in a tissue," and "diagnosing his mother with illness based

on a complete lack of medical training," but the court in its decision failed to mention and consider the material undisputed facts that Petitioner's mother had suffered an alarming deterioration of her health, had subsequently coughed up purulent mucous in copious quantities after she had coughed up a large y-shaped mucous plug which clearly justified Petitioner's concern for his mother's health, that Petitioner took the sample of his mother's sputum to a doctor for the purpose of his inspection of it, and who, not petitioner, diagnosed his mother with bronchitis. Section A supra at pgs.3-6 and 11-12. App.108-109 (text of pgs.24-25 of Pt's deposition cited by court).

In regard to Petitioner's claim of state action by Sweet Home and (Jensen/Wells), the court stated as the factual basis of its decision that the visitation *restrictions* were "compelled" by State defendants and therefore there was no "willful" participation by private defendants in imposing them and no state action. App.17 and 19(see bold text). This is a misrepresentation of the material issue of fact of state action raised by the pleadings of whether the visitation *restrictions* were "*reasonable*," i.e. lawful. SAC ¶ 87. If they were not, there is no question of willful participation by private parties in unlawful state action, because the private parties unlawfully influenced the state to approve visitation *restrictions* instead of restoring Petitioner's visitation rights.

The "compulsion" was to *admit* Petitioner to Sweet Home because his mother wished for him to visit her, a statement she had made to Gopaul months before and which imposed on State defendants a duty to order Petitioner admitted to Sweet Home without delay. See App.43 (Cal.H & S code 1569.35). And see SAC ¶¶ 52 and 58. However, instead of citing Sweet Home for neglect of Petitioner's mother's personal and health care and retaliation against Petitioner for reporting it, and restoring Petitioner's visitation rights without delay and *without* restrictions, Petitioner remained *unlawfully* barred from Sweet Home for five months with the necessary significant assistance of State defendants who were

mandated by law to complete an investigation in "ten days." The issues raised by the pleadings are that Sate defendants granted private defendants a five month delay before ordering Petitioner admitted to Sweet Home, and granted private defendants the right to impose visitation *restrictions* "without just cause" and for retaliatory or discriminatory reasons.[24] SAC ¶¶ 87, 90, 91(d), 93. § A supra at pgs.7-10.

D. The Decisions of the Court of Appeals

Petitioner was prejudiced on appeal by the district courts recitation of the moving parties version of the facts in its decision, instead of petitioners, by its many misrepresentations in favor of moving parties, and by its failure to identify and consider the factual and legal issues raised by the pleadings. Petitioner argued that the district court had failed to consider virtually all of Petitioner's evidence supporting his claims and negating defendants' defenses and raised the issue of the prejudicial conduct of the proceedings. The Court of Appeals however ratified the moving parties, and the district court's conduct by affirming the judgment as to all defendants and failed to consider Petitioner's request for judicial notice of facts related to the prejudicial conduct of the proceedings. App.1. Petitioner subsequently filed a motion for rehearing and for rehearing en banc. The court of appeals denied the motion App.38.

REASONS FOR GRANTING THE WRIT

A. The District Court Arbitrarily Foreclosed any Opportunity for Petitioner to Make a Showing on his Claims

Summary of Argument: The district court and the moving parties engaged in arbitrary and self-serving manipulation of the issues raised for review, the evidence presented in support of them, and the law and rules governing the standard

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[24] *West v. Atkins*, 487 US 42, 49 (1988).

of review and the burdens of the parties on summary judgment. This case provides evidence that such arbitrary conduct constitutes a tacitly accepted pattern and practice in the 9th Circuit courts and among the 9th Circuit Bar for which there is no realistic avenue for relief or correction except by Writ of Certiorari. This court should make it clear that such conduct is not an acceptable practice.

Summary Judgment Standard of Review: The court must first examine the pleadings to determine what issues of fact they present before considering any outside matter to determine whether any of the issues raised by the pleadings are genuine material issues of fact. *Wright, Miller, Kane, Federal Practice and Procedure*, 3d § 2721. *Adikes v. Kress*, 398 US 144, 156 (1969). "[T]he availability of summary judgment turn[s] on whether a proper jury question [is] presented. *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 249 (1986) (citing *Adikes*). To meet its initial burden the moving party must foreclose all material facts and justifiable inferences raised by the non-moving parties' materials. *Adikes* supra at 158-161, *Nissan Fire & Marine Ins. Co. v. Fritz Companies*, 210 F.3d 1099, 1105 (9th Cir. 2000). *Clark v. Coats & Clark, Inc.*, 929 F.2d 604, 607 (11th Cir. 1991). The non-moving party's "version of any disputed issue of fact is presumed correct. Therefore we *begin* with the factual basis of [the non-moving party's] claims." *Kodak v. Image Technical Services*, 504 US 451, 456 (1992) (emp. added).

1. Petitioner's Pleadings and Detailed Pleaded Facts and Evidence Raise Genuine Issues of Material Fact that Moving Parties and the Court Failed to Mention and Dispute.

- Did Sweet Home neglect Petitioner's mother's personal and health care and threaten and endanger her health? See section A, pgs.1-12.
- Did Jensen/Wells, Kaiser, and State defendants fail to properly determine that Petitioner's mother's personal and health care were neglected, and fail to properly construe Petitioner's conduct of investigating, observing and reporting

the neglect of his mother as warranted and reasonable conduct under the circumstances? Id.

- Did Jensen/Wells', Kaiser's, and Sweet Home's conduct and words indicate their retaliatory or discriminatory motive and intent, and indicate that assertions that Petitioner's "conduct" justified their challenged actions were pretexts for their retaliation or discrimination in response to Petitioner's reports of the neglect of his mother's personal and health care and advocacy for its correction? Id.

- Did State defendants fail to properly determine that Petitioner's mother's personal and health care were neglected, and that Petitioner's "conduct" was warranted and reasonable under the circumstances, by recklessly agreeing with private defendants' discriminatory or retaliatory allegations against Petitioner, by acting according to a discriminatory custom and policy that subjected Petitioner's mother to the unreasonable risk that she would suffer neglect of her personal and health care, and subjected Petitioner to an unreasonable risk that he would suffer from retaliation without remedy for reporting it, and by substituting their own judgment for the judgment of the private defendants? Id. And see note 18.

2. The District Court Arbitrarily Based its Determination of the Disputable Issues of Fact on Moving Parties' Version of the Facts Instead of on the Issues Raised by the Pleadings.

The district court admitted that it failed to consider Petitioner's pleaded verified facts for the reason that it did not qualify as an affidavit under Rule 56(e). Pg. 19 supra. However, the court not only did not consider them as an affidavit, it also failed to consider them and all the evidence supporting them as *pleaded* facts. See section A, pgs.1-12 supra. *Adikes*, *Anderson* supra (the moving parties and the court must foreclose material facts and inferences *raised by the pleadings* and other summary judgment materials). Nowhere in its decision does the court consider Petitioner's detailed pleaded facts and evidence of Jensen/Wells', Sweet

Home's, and Kaiser's adverse actions and statements against Petitioner that occured in close proximity of time to his reports of the neglect of his mother's personal and health care as evidence of their retaliatory or discriminatory motive and intent. And nowhere does the court consider Petitioner's detailed pleaded facts and evidence of the neglect of his mother's personal and health care as evidence that the assertion that Petitioner's "conduct" of investigating, observing and reporting it justified their challenged actions was a pretext for their retaliation or discrimination. Instead it is clear the court ignored and failed to consider these dispositive issues and the evidence supporting them altogether.[25]

Instead of first considering whether moving parties had met their initial burdens of showing a lack of a dispute of a genuine issue of material fact based on the material issues raised by the pleadings, the court improperly proceeded to grant defendants' motions based on the perceived deficiencies in Petitioner's responses to the issues raised by the moving parties' version of the facts. See App.30-31(S. D.'s alleged threat from Petitioner), App.23 (Kaiser's alleged medical reasons), App.17, 19(S. H.'s alleged compulsion)

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[25] In regard to State and Sweet Home defendants and Jensen/Wells, see e.g. note 1 and related text; App.31 (the court misrepresents petitioner's concern for the neglect of his mother by stating that Petitioner's "only desire" was to visit his mother); note 3 and related text (all of the adverse actions and statements against petitioner occurred in close proximity of time to Pt's reports); notes 3, 5, 9, 10 and related text (multiple discriminatory or retaliatory statements were made); note 23 and related text (Petitioner's reports clearly not given credit by State defendants).

In regard to Kaiser defendants, see e.g. App.24 (The court states the issue it considered as Kaiser's "failure to give credence to Jensen's belief that his mother had a UTI," but failed to consider Petitioner's pleaded facts and evidence of his reports to Kaiser of his mother's deteriorated health, *symptoms* of UTI, symptoms of illness in the elderly, diagnosis of bronchitis, Sweet Home's neglect of his mother's *personal* care, Kaiser employee Mostrales' discriminatory statements, Kaiser's unreasonable responses to his reports, and Kaiser's failure to take reasonable remedial action as evidence that Kaiser failed to give credit to Petitioner's reports for discriminatory reasons. Section A supra at pgs. 4-7.

3. The District Court's Arbitrary Failure to Consider the Issue of the Neglect of Petitioner's Mother Foreclosed any Opportunity to Make a Showing on any Claim

Petitioner could not possibly meet any burden of persuasion because the court arbitrarily gave moving parties the benefit of treatment of their version of the facts as correct, and arbitrarily failed to consider the material issues raised by the pleadings and the evidence supporting them. A summary judgment is not a procedural gambit whereby a court can shift the burden of proof by selective consideration of the issues and evidence. Properly considered, the dispositive factual issue of the case that is determinative of all the other issues for both Petitioner's claims and moving parties' defenses is Petitioner's pleadings and detailed pleaded facts and documentary evidence of moving parties' neglect of his mother's personal and health care. Section A pgs.3-7, 11-12 supra. The district court wholly ignored this material issue. There could hardly be retaliation or discrimination against Petitioner without a motive which is the substance of the court's opinion, and which it can only obtain by ignoring and failing to consider the pleaded facts of Petitioner's reports of moving parties' neglect of his mother's personal and health care and the pleaded facts and evidence of their retaliation and discrimination against him for reporting it. Id. See c.f. *Perry v. Sinderman*, 408 US 593, 598 (1972) (claim was foreclosed by the district courts failure to consider it).

4. The District Court's Arbitrary Judgment on Jensen/Wells' Motive and Intent Foreclosed any Opportunity to Make a Showing on Claims Against Jensen/Wells

The district court's judgment of Jensen/Wells' retaliatory or discriminatory motive and intent on a motion to amend, and its dismissal of them as defendants on that basis, was arbitrary and done in the absence of all discretion. See pgs.15-16 supra. It is not the court's permitted role to decide facts *on* a summary judgment motion, much less *before* one

is filed. Moreover, the court does not have any discretion in granting a summary judgment motion to make an evidentiary ruling excluding statements made that evidence improper motive, intent and plan that is a specific hearsay exception on the arbitrary basis that it *is* hearsay! F.R.Evid. 803(3). App.18, 36 (see bold text). Moreover, treated properly in the light favorable to Petitioner, the "behavior" Jensen/Wells and Sweet Home were "concerned" about were the "troubles" Petitioner's reports of Sweet Home's neglect of his mother's personal and health care and advocacy for its correction caused them. App.110, 124. And see note 3, 6, 17, and 25.

5. The District Court's Arbitrary Adoption of Moving Parties' Misrepresentations of the Issues Raised by the Pleadings Foreclosed any Opportunity to Make a Showing on Petitioner's 1st Amendment Claims

Sweet Home repeatedly throughout the proceedings misrepresented Petitioner's 1st Amendment claim by citing *Hudgens v. NLRB*, 424 US 507 (1975), but necessarily without explaining how or why that citation was relevant to the facts of this case because it isn't. See note 16 and related text. The court arbitrarily adopted Sweet Home's misrepresentation of the facts and legal issues, cited *Hudgens* in denying petitioner's 1st Amendment claim, App.28-29, and failed to consider the 1st Amendment issues *raised by the pleadings* of State and private defendants' violation of Petitioner's rights of free speech and association for the purpose of reporting the neglect of his mother and advocating for its correction. See notes 16 and 18 and related text.[26]

Elder abuse is a matter of public concern, and access to remedial state procedures, and petitioner's advocacy and

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[26] See also SAC ¶¶59-60 (in justifying her decision to impose visitation restrictions Arrington stated that Petitioner's advocacy for correction of the neglect of his mother' personal and health care had "caused turmoil at Kaiser"). And see App.30 (the court treated Petitioner's necessary advocacy for his mother as "diagnosing his mother with illness based on a complete lack of medical training").

association with his mother for its correction is protected from interference by the state by the 1st Amendment. See e.g. *Hufford v. McEananey*, 249 F.3d 1142, 1148 (9th Cir. 2001) (legitimate whistleblowing protected speech). *White v. Lee*, 227 F.3d 1214 (9th Cir. 2000)(association, advocacy, and petition activities against private entity protected even for advocacy of unlawful acts). And see *Perry v. Sinderman* supra (the district court foreclosed any opportunity to make a showing on Pt's free speech claim by not considering it).

B. Proper Consideration of the Dispositive Factual Issue Raised by the Pleadings Shows that the Judgment in this Case is a Manifest Injustice

All of Petitioner's documentary evidence supports his verified allegations of the neglect of his mother's personal and health care, and all of it is either admissions of opposing parties or is not disputed.

State and Sweet Home defendants have nothing but conclusory denials of that neglect by persons who lack personal knowledge of what Petitioner witnessed at Sweet Home. See notes 6 and 17. Treated in the light favorable to Petitioner, the best that can be said for Kaiser is that they disputed that Petitioner's mother had a UTI when Petitioner reported her symptoms. But the court considered only the UTI issue, not any *pleaded* factual issues nor *any* evidence supporting the issues of the neglect of his mother's care Petitioner reported to Kaiser, and Kaiser's unreasonable responses to it that are material to Kaiser's liability. See note 25. [27]

Moreover, the fact that Petitioner's mother died of

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[27] See also e.g. bold text at App.25-6(the court attributes to Petitioner an argument and evidence offered by *Kaiser defendants*, Doc # 323 at 6). The court concludes that *Kaiser's* self-serving submission *against* petitioner "illustrates the character of the 'evidence' *Jensen* has offered" while arbitrarily failing to consider *Petitioner's* submitted evidence or even considering what Kaiser may have self-servingly failed to mention.

complications of her UTI a year after Petitioner reported her symptoms is evidence supporting Petitioner's pleaded allegations of neglect of his mother's health care. It was clearly neglectful of State and Sweet Home defendants to not recognize Petitioner's mother's need for medical care even when it became clearly obvious, and it is hardly indicative of Jensen/Wells' purported concern for Petitioner's mother. App.137. App.45 (Cal.C.Regs, Tit.22, § 87591). Furthermore, the court ignored and failed to consider the evidence that indicated that Kaiser's defense of its medical reasons for failing to credit Petitioner's reports of his mother's symptoms of UTI was a pretext for its discrimination against petitioner.[28]

C. The District Court Has a Record and History of Failing to Consider Evidence and Drawing Conclusions Unsupported by the Evidence

In reviewing the decision of the same district court in *Headwaters Forest Defense v. County of Humboldt*, the court of appeals stated that the district court, in its judgment as a matter of law, "fails to mention [evidence favorable to the plaintiffs], let alone view it in the light favorable to the plaintiffs as the nonmoving parties." *Headwaters* at 1201. The court of appeals also pointed out that the district court's "characterization of the evidence" asserted conclusions that were unsupported by the evidence. *Headwaters* at 1201 and 1202-03. *Headwaters Forest Defense Fund v. County of Humboldt*, 240 F.3d 1185, 1197 (9th Cir. 2001), vacated and remanded on other grounds, *Humboldt County v. Headwaters Forest Def.*, 534 U.S. 801 (2001).

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[28] See e.g. App.23 (the court considered Jue's declaration that Petitioner's mother had no clinical symptoms of UTI "such as fever" or "burning pain with urination" to be dispositive). But failed to consider ER 48 (pg.1 of Pt's mother's Hospital "Transfer Summary" stating that *she had no fever* and *no burning pain with urination was reported* when she was *admitted to the hospital* with an acute UTI).

Exactly the same thing happened in Petitioner's case, and the fact that it did indicates that it has happened in other cases, and will continue to happen and prejudice other litigants until corrective action is taken.

D. The Court of Appeals Improperly Ratified an Arbitrary Judgment Pursuant to Pattern of Arbitrary Conduct by the District Court

The decision of the district court was replete with the type of arbitrary conduct the court of appeals had previously complained of in *Headwaters*, and the record showed moving parties complicity in them. The court of appeals, however, merely followed the judgment of the district court indicating it did not undertake the review required.

The court of appeals abdicated its ethical and supervisory duties to take notice of and correct the defendant parties' and the district court's interference with the proper conduct of the proceedings and corruption of the court's process, indicating that this type of improper conduct will continue to prejudice non-moving parties on summary judgement in the Ninth Circuit.

CONCLUSION

The Arbitrary conduct and abuse of the Federal Court's process described above discredits the Federal Bar and the Federal Court, and caused a manifest injustice to occur. This Court should grant certiorari in this case to make it clear that such conduct is not acceptable practice in the federal court system, and to decide that moving parties did not meet their initial burden on summary judgment in the district court .

Respectfully submitted by, Tom Jensen,

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UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

No. 05-15346
D.C. No. CV-00-03261-VRW
(Filed May 18, 2006)

Tom Jensen,

Plaintiff-Appellant,

v.

Sweet Home One Care Facility,
A business entity, et al.,

Defendants – Appellees

Appeal from the United States District Court
for the Northern District of California
Vaughn R. Walker, District Judge, Presiding

Submitted May 15, 2006

MEMORANDUM

Before: B.Fletcher, Trott, and Callahan, Circuit Judges.

Tom Jensen appeals pro se from the district court's summary judgment for defendants, on remand from this court, in his action alleging various civil rights causes of action against his siblings and other individuals who were involved in the care of his late mother while she lived at a residential care facility for the elderly. We have jurisdiction under 28 U.S.C. § 1291. After de novo review, *Lopez v. Smith*, 203 F.3d 1122, 1131 (9th Cir. 2000) (en banc), we affirm.

The district court properly granted summary judgment on Jensen's 42 U.S.C. § 1983 claims against Sweet Home defendants because he did not raise a triable issue of fact as to whether those defendants were willful participants with the state or its agents in an activity that deprived him of his

constitutional rights. See *Brunette v. Humane Soc'y*, 294 F.3d 1205, 1211 (9th Cir. 2002). Jensen also could not raise a triable issue of fact as to whether the state defendants violated his constitutional rights by investigating his complaints and compelling Sweet Home to restore his visitation rights wit restrictions.

The district court properly granted summary judgment on Jensen's discrimination claims under the American's with disabilities Act and the Rehabilitation Act because he failed to raise a triable issue of fact as to whether his alleged exclusion from participation in any program was solely on account of a perceived disability. See *Weinreich v. Los angeles county MTA*, 114 F.3d 976, 978-79 (9th Cir. 1997). The district court properly granted summary judgment on Jensen's claims under California's Unruh Act because actions a business enterprise takes in response to inappropriate conduct do not constitute arbitrary discrimination. See Cal. Civil Code § 51; *Marina Point, Ltd v. Wolfson*, 640 P.2d 115, 124-27 (Cal. 1982).

The District court did not abuse its discretion in denying Jensen's motion for additional discovery pursuant to Fed. R. Civ. P. 56(f) because Jensen failed to show how additional discovery would uncover specific facts that would preclude summary judgment. See *California ex rel. California Dep't of Toxic Substances control v. Campbell*, 138 F.3d 772, 779 (9th Cir. 1998).

Jensen's remaining contentions lack merit.

We deny all pending motions

AFFIRMED

App. 3

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF CALIFORNIA

No. C oo-3261 VRW
(Filed July 29, 2003)

TOM JENSEN,
Plaintiff

v.

SWEET HOME ONE CARE FACILITY, et al,
Defendants

ORDER

****

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agents effecting a constitutional deprivation. Johnson v Knowles, 113 F3d 1114, 1119 (9th Cir 19977

5/14/03 Order (Doc #224), at 8-9.

Jensen fails to cure the deficiency of his earlier proposed pleading. Jensen has added allegations and exhibits indicating that Peter Jensen and Beth Wells, at times acting through their agent Don Wells, suggested certain visitation restrictions to state officials. Prop TAC, ¶¶ 75(a), 87, Exh D at 1-2. But even the attached exhibits, if taken as true, acknowledge that **plaintiff's siblings merely expressed their views to state officials in the hope they would agree** (emphasis added for purposes of citation to this text at pg.16 of writ). To the extent the ultimate decision distinctly remained with public officials, Jensen's siblings were therefore not the cause of plaintiff's purported constitutional deprivation. See Prop TAC, Exh D at 2 ("Don and I have reworked the restrictions so that we think they will be approved by CCL. Of course, they must satisfy your concerns."); id., Exh D at 3 (letter by staff attorney from

California Department of Social Services rejecting proposed restrictions by Peter Jensen).

Plaintiff has failed to state factual allegations to support a claim that his siblings were willful participants in the particular state action effecting a constitutional deprivation. While **plaintiff's family members may have expressed their views and preferences to state officials, the proposed TAC fails to allege that Peter Jensen and Beth Wells were "joint" participants in the decision to impose the visitation restrictions at issue** (emphasis added for purposes of citation to this text at pg.16 of writ). Accordingly, leave to amend Plaintiff's section 1983 claim to add his siblings is DENIED.

****

IT IS SO ORDERED.

Vaughn R. Walker
U.S. District Judge

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF CALIFORNIA

No. C oo-3261 VRW
(Filed Ap.27, 2004)

TOM JENSEN,
Plaintiff

v.

SWEET HOME ONE CARE FACILITY, et al,
Defendants

ORDER

Plaintiff recently filed two motions. Plaintiff first moves the court to strike Kaiser defendants' answer to plaintiff's second amended complaint. Pl Mot (Doc # 296).

Plaintiff also moves the court for various discovery-related relief, including sanctions. Pl Mot (doc # 302).

The parties are scheduled for a dispositive motions hearing date of October 28, 2004. The fact discovery deadline is September 30, 2004.

The court's standing orders require a party to obtain leave of court before filing a motion to compel discovery responses. See standing Orders at ¶ 2. To streamline this litigation, the court deems it appropriate to extend this requirement to all motions. Accordingly, unless the parties are granted leave by the court for good cause shown, no motions will be heard prior to the October 28, 2004, dispositive motions hearing date. Leave may be requested by:

1. Requesting a telephone conference with all parties or
2. Sending a letter to the court, not exceeding two pages, with copies served on all parties.

As noted above, plaintiff has two pending motions. The court TERMINATES plaintiff's motion to strike and for various discovery-related relief and VACATES their

respective hearing dates. If plaintiff seeks to strike the Kaiser defendant answer, he may include such an argument in any dispositive motion to be heard on October 28, 2004. If plaintiff seeks to bring a discovery related issue to the court's attention, he may file a letter, not exceeding two pages, alerting the court to the nature of the dispute.

IT IS SO ORDERED.

Vaughn R. Walker
U.S. District Judge

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF CALIFORNIA

No. C 00-3261 VRW
(Filed Jan. 31, 2005)

TOM JENSEN,
Plaintiff

v.

SWEET HOME ONE CARE FACILITY, et al,
Defendants

ORDER

After four years of contentious litigation, an intermediate appeal to the Ninth Circuit and a literal mountain of filed documents (occupying eleven large file folders), this case has finally reached its final summary judgment phase. As the litigation currently stands, plaintiff Tom Jensen (Jensen) alleges several federal and state law causes of action against an inordinate number of defendants. Doc # 311. Currently before the court are all defendants' separate motions for summary judgment. Docs ## 322, 339, 332. Also before the court are Jensen's two motions for reconsideration of the court's orders denying his

motion for summary judgment and his motion to strike as well as Jensen's FCRP 56(f) application. Docs ## 336, 338, 358. Based upon the extensive memoranda filed by all parties, the court reasoned that oral argument was unnecessary and accordingly vacated the hearing that was scheduled for November 4, 2004. Doc # 354. After reviewing the parties' memoranda and the applicable law, the court DENIES Jensen's motions for reconsideration, DENIES Jensen's 56(f) application and GRANTS all defendants' motions for summary judgment.

I

The facts of this case were recited accurately , and amply, in the court's May 14, 2003 order. Doc # 248. Accordingly, the following factual summary is taken mostly from that order.

Jensen commenced this action on September 11, 2000, alleging various civil rights causes of action against his siblings, Beth Wells and Peter Jensen, and other individuals who had been involved in the care of his deceased mother. Id at 2. Prior to her death, Jensen's mother had been a resident at Sweet Home One Care Facility for the elderly in Fremont, California. Id.

Jensen became concerned about his mother's treatment at Sweet Home beginning in early 1997. Id. During 1999, Jensen frequently visited his mother at Sweet Home beginning in early 1997. Id. During 1999, Jensen frequently visited his mother at Sweet Home, where he allegedly witnessed mistreatment of her by Sweet Home staff. Kd. Although Jensen relayed his concerns to his mother's primary care physician and health care provider, Dr, Bill Jue (Dr. Jue) and Kaiser Permanente (Kaiser) respectively, neither, according to Jensen,

investigated or acted on his concerns. Id. Similarly, when Jensen expressed his concerns to his siblings, Beth Wells and Peter Jensen, both of whom held durable power of attorney over their mother's health care, neither sibling chose to pursue Jensen's complaints. Id. Instead, Peter Jensen stated that Jensen's actions were "disruptive" to Sweet Home. Id.

Based on his belief that his mother was not receiving adequate medical care at Sweet Home and without his siblings' permission, Jensen began taking his mother to see other doctors, both inside and outside the Kaiser system. Doc # 311, ¶¶ 27, 40. In order to transport his mother to these different doctors, Jensen would place his mother in his

motor home, without a seatbelt, and drive her to the doctor's office. Doc # 330, Ex 2 at 116 (Jensen deposition). On October 13, 1999, when Jensen was attempting to take his mother on one of these appointments, Minerva Mostrales (Mostrales), and employee of Sweet Home, attempted physically to prevent Jensen from leaving the Sweet Home premises with his mother. Doc # 311, ¶ 40. Also, Jensen began changing his mother's adult "diapers," and inspecting her vaginal and anal areas for "uncleanness." Doc # 330, Ex 2 at 109. During a visit to Sweet Home, Jensen entered another resident's room and began questioning her regarding whether she was "getting [her] oxygen." Id. at 120. To pacify his concerns, Jensen began inspecting the woman's oxygen machine and its tubing. Id. Finally, Jensen began tape recording his conversation with his mother and attempted to record conversations he had with Sweet Home employees. Id. at 88-89, 125-25.

Viewing Jensen's behavior as strange and potentially

dangerous, Peter Jensen (under the auspices of his power of attorney, and with the express approval of his sister Beth Wells) forbade Sweet Home from allowing Jensen to visit their mother and threatened to "involve the police and take formal legal action" if Jensen persisted in his course of action. Doc # 248 at 3. Sweet Home complied with Peter Jensen's orders.

In October 1999, Jensen filed a complaint with Ombudsman, Inc of Alameda County, an agency created by the California Department of Social Services (DSS) to receive and investigate complaints of neglect or abuse of residents at licensed residential care facilities. Id. Not satisfied with Ombudsman's actions, Jensen filed a 150-page complaint with the Oakland office of the Community Care Licensing Division (Licensing division) of the DSS. Id.

On April 3, 2000, Sweet Home, pursuant to the Licensing Division's order, issued visitation restrictions for Jensen. Id.

This plan limited Jensen to one-hour-long visits twice a week with his mother. Id. In addition, these visits could only occur in a "common area" of the Sweet Home facility. Id.

* page 5 *

Jensen promptly decided to appeal the Licensing Division's conclusion, but his repeated requests for information concerning the appeals process were ignored by the Licensing Division. Id at 4. Jensen then commenced the instant action against his siblings, Sweet Home and several of its agents or business partners (Sweet Home defendants) and the Licensing Division and the investigators who handled Jensen's complaint (state defendants).

In his first amended complaint, Doc # 3, Jensen alleged four claims against defendants: (1) a § 1983 claim against the state defendants and Sweet Home defendants, for violation of Jensen's First, Fifth and Fourteenth Amendment rights; (2) a claim under 24 USC § 1985(3) against his siblings, state defendants, Sweet Home defendants and Kaiser defendants for conspiracy to deny Jensen's rights to equal protection of the law; (3) a § 1983 claim against the state defendants for equal protection violations due to its lack of appeal procedures and (4) violations of the Americans with Disabilities Act (ADA), the Rehabilitation ACT of 1972 (RA) and the Age Discrimination Act of 1975 against state defendants. Jensen also sought injunctive relief on behalf of his mother.

In a written order dated January 31, 2001, the court, per Judge Susan Illston, dismissed all of Jensen's claims with prejudice and entered judgment in favor of defendants. See Doc # 73. The court subsequently denied Jensen's motions to alter or amend judgment, Doc # 88, and for reconsideration, Doc 91. Jensen appealed all of these decisions to the United States Court of Appeals for the Ninth Circuit, which consolidated the appellate

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proceedings and, on July 1, 2002, issued a decision affirming

n part and reversing in part. See Doc # 136. The Ninth Circuit affirmed the district court's decision to dismiss all of Jensen's claims with prejudice with the sole exception of his First and Fourteenth Amendment claims against state defendants and Sweet Home defendants. Id. at 2 ("Because [Jensen] had sufficiently alleged that the private defendants were state actors they could not unreasonably restrict his First and Fourteenth Amendment rights.").

On remand, Jensen moved for leave to amend his complaint, for sanctions against defense counsel and for relief from judgment, all of which were denied. See Docs # 139, 143, 153, 173. Peter Jensen and Beth Wells, who had not been named as defendants on the sole surviving claim, sought and received an order dismissing them from the action entirely. Doc # 141. All of Jensen's attempts to pull his siblings back into this suit have been denied.

Jensen then moved to recuse Judge Illston from presiding further over this action. See Doc # 175. On February 5, 2003, Judge Illston recused herself, and the action wa reassigned to the undersigned. See Docs ## 182, 185.

In orders dated May 14, 2003, and July 31,2003, the court granted Jensen's motion to amend his complaint to include: (1) an ADA and RA claim against state defendants; (22) a civil rights claim under the Unruh Civil Rights Act, Cal Civ Code § 51 et seq (Unruh Act) against Sweet Home defendants; and (3) the same Unruh Act claim against Kaiser defendants. Docs ## 224, 248.

Jensen moved for summary judgment in his favor, which the court denied. Doc # 248. **Disregarding some insignificant motions brought and adjudicated in the interim** (emphasis added for purposes of citation to this text at pg.18, n.22 of writ), the current state of this

litigation is as follows: (1) As to Sweet Home defendants, Jensen asserts a § 1983 claim, alleging violations of First and Fourteenth Amendment rights, and a claim for violation of

the Unruh Act; (2) as to the state defendants, Jensen asserts the same § 1983 claim asserted against Sweet Home defendants, as well as a claims (sic) of discrimination pursuant to the ADA and RA; and (3) as to Kaiser defendants, Jensen asserts a claim for violation of the Unruh Act. Doc # 311 (Second Amended Complaint) (SAC). It should be noted that the SAC also includes causes of action which have been disallowed by either this court or the Ninth Circuit (e g, equal protections claim, procedural due process claim and claims against Peter Jensen and Beth Wells). As these claims have already been properly dismissed, the court will not consider or discuss Jensen's references to these barred causes of action.

All defendants have moved for summary judgment on all claims against them, Docs ## 322 329, 332, while Jensen has moved the court to reconsider its orders denying his motion for summary judgment and denying his motion to strike Kaiser defendants' answer to the SAC, Docs ## 338, 339. Jensen has also filed an application pursuant to FRCP 56(f) claiming that he cannot oppose defendants' summary judgment motions; he need more discovery in the form of depositions to raise a genuine issue of material fact. Doc. # 358 at 11-12.

To these disputes the court now turns.

II

The court will first, and quickly, address Jensen's motions for reconsideration, for these motions are procedurally

* page 8 *

flawed. Under the local rules, Jensen is required to seek leave to file a motion of reconsideration before he files such a motion for reconsideration (emphasis in original). Civ L R 7-9(a). At no time did Jensen seek leave to file the current two motions for reconsideration. Moreover, Jensen's pro se status does not excuse him from compliance with the court's

local rules. See King v Atiyeh, 814 F2d 565, 567 (9th Cir 1987). Lack of awareness of the applicable rules and procedure is no excuse for failure to comply with those rules. See Swimmer v IRS, 811 F2d 1343, 1344 (9th Cir 1987).

Accordingly, Jensen's motions for reconsideration are DENIED.

III

A

In reviewing a summary judgment motion, the court must determine whether genuine issues of material fact exist, resolving any doubt in favor of the party opposing the motion. "[S]ummary judgment will not lie if the dispute of material fact is 'genuine,' that is, if the evidence is such that a reasonable jury could return a verdict for the nonmoving party." Anderson v. Liberty Lobby, 477 US 242, 248 (1986). "Only disputes over facts that might affect the outcome of the suit under the governing law will properly preclude the entry of summary judgment." Id. And the burden of establishing the absence of a genuine issue of material fact lies with the moving party. Celotex Corp v Catrett, 477 US 317, 322-23 (1986). Summary judgment is grated only if the moving party is entitled to judgment as a matter of law. FRCP 56(c).

The nonmoving party may not simply rely on the pleadings, however, but must produce significant probative evidence, by affidavit or as otherwise provided in FRCP 56, supporting its claim that a genuine issue of material fact exists. TW Elec Serv v Pacific Elec Contractors Assn, 809 F2d 626, 630 (9th Cir 1987). The evidence presented by the nonmoving party "is to be believed, and all justifiable inferences are to be drawn in his favor." Anderson, 477 US at 255. "The judge's function is not himself to weigh the evidence and determine the truth of the matter but to determine whether there is a genuine issue for trial." Id. at

249.

The evidence presented by both parties admissible. FRCP 56(e). Conclusory, speculative testimony in affidavits and moving papers is insufficient to raise genuine issues of fact and defeat summary judgment. Thornhill Publishing Co, Inc v GTE Corp, 594 F2d 730, 738 (9th Cir 1979). Hearsay statements found in affidavits are inadmissible. Japan Telecom, Inc v Japan Telecom America Inc, 287 F3d 866, 875n1 (9th Cir 2004).

B

Whether to allow further discovery under Rule 56(f) is a subjct committed to the district court's discretion. Nidds v Schindler Elevator Corp, 113 F3d 912, 920 (9th Cir 1996). In considering such a request, the stage of the litigation is an important consideration. For example, if the movant has failed diligently to pursue discovery I the past, the court has discretion to deny Rule 56 (f) application. Id. Likewise, when "a summary judgment motion is filed * * * early in the litigation, before a party has had any realistic opportunity to pursue

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discovery relating to its theory of the case, district courts should grant any Rule 56(f) motion fairly freely." Burlington Northern Santa Fe Railroad Co v Assiniboine & Sioux Tribes of the Ft Peck Reservation, 323 F3d 767, 773 (9th Cir 2003). Additionally, the Rule 56(f) application must be made before the summary judgment hearing. Ashton-Tate v Ross, 916 F2d 516, 520 (9th Cir 1990).

The party seeking a Rule 56(f) continuance should demonstrate that: (1) It has set forth in affidavit form the specific facts that it hopes to elicit from further discovery; (2) the facts sought actually exist; and (3) these sought-after facts are essential to resist the summary judgment motion. California v. Campbell, 138 F3d 772, 779 (9th Cir 1998).

IV

Rule 56 Application

Jensen's application for further discovery pursuant to FRCP 56(f) fails to met the requirements of Campbell. Jensen's application asserts that he has not had "the financial resources to pay for depositions or for an expert opinion." Doc # 359 at 3 (supporting decl). Moreover, Jensen claims that defendants have refused to "stipulate to low cost deposition procedures." Doc # 358 at 11. "For the foregoing reasons, [Jensen] has not been able to use depositions" in opposing defendants' summary judgment motions. Id at 12.

The application, however, does not set forth: (1) the specific depositions Jensen wishes to take (e g, his siblings, Sweet Home defendants, etc), (2) the specific facts Jensen hope to

* page 11 *

obtain from these depositions or (3) Why these facts are essential to oppose the current motions for summary judgment. Jensen cannot avoid summary adjudication simply by asserting that, if he could afford it, he would conduct additional deposition discovery. Moreover, **Jensen has had ample opportunity to pursue discovery relating to the theory of his case** (emphasis added for purposes of citation to this text at pg.18, n.22 of writ). Indeed, in his opposition memoranda, Jensen supplies literally hundreds of documents produced by defendants during the discovery process in this case.

Accordingly, Jensen's Rule 56(f) application is DENIED.

V

Sweet Home Defendants

As mentioned above, Jensen alleges that Sweet Home defendants violated his First and Fourteenth Amendment rights, thereby exposing them to liability under § 1983, and that they violated his civil rights as guaranteed by the Unruh

Act. SAC ¶¶ 86-105.

Regarding the § 1983 claim, Jensen asserts that the April 2000, visitation restrictions, as drafted and enforced by Sweet Home, violated Jensen's First Amendment right to "speak freely" with his mother and with his fourteenth Amendment right to an intimate familial association. Id, ¶¶ 96-97. As to the Unruh Act claim, Jensen claims that Sweet Home defendants, based solely upon their misperception that Jensen was mentally disabled, intentionally discriminated against him by "denying him access" to the Sweet Home facility (i e, by imposing the visitation restrictions). Id, ¶¶ 101-105. The court addresses these claims in that order.

* page 12 *

To prevail on a claim brought under § 1983, a plaintiff must prove two essential elements: (1) that defendants acted under color of state law and (2) that defendants caused plaintiff to be deprived of a right secured by the Constitution and laws of the United States. West v Atkins, 487 US 42, 49 (1988); Johnson v Knowles, 113 F3d 1114, 1117 (9th Cir 1997). If the answer to either inquiry is no, the § 1983 claim fails.

"To constitute state action, 'the deprivation must be caused by * * * a person for whom the State is responsible' and 'the party charged with the deprivation must be a person who may fairly be said to be a state actor.'" West, 487 US at 49-50 (quoting Lugar v Edmondson Oil Co, 457 US at 937)).

Jensen concedes that Sweet Home defendants are private actors, and thus their conduct is ordinarily not subject to § 1983 liability. In fact, "when addressing whether a private party acted under color of state law, [courts] therefore start with the presumption that private conduct does not constitute governmental action." Sutton v Providence St Joseph Medical Center, 192 F3d 826, 835 (9th Cir 1999) (citations omitted). See Mathis v Pacific Gas and Electric Co, 75 F3d 498, 501 (9th Cir 1996) ("While we sometimes treat acts of private parties as public, we do so sparingly.").

Consequently, in attempting to hold a private actor liable under § 1983 a plaintiff bears the heavy burden of proving that the private actor was a "willful participant in joint action with state officials." Mathis, 75 F3d at 503 (emphasis added) (internal quotations omitted).

Accordingly, in order to survive summary judgment on his

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§ 1983 claim against Sweet Home defendants, Jensen was required to come forward with enough probative and admissible evidence establishing a genuine issue of fact whether Sweet Home defendants willfully participated with state defendants (i e, Licensing Division) in depriving him of his putative constitutional rights.

Jensen did not come close to meeting this burden. In fact, Jensen himself rings the death knell for this claim in his opposition by stating: "Sweet Home [argues] that they * * * did not agree to the imposition of the visitation restrictions, instead they were compelled to impose them [by state defendants]. Indeed they were." Doc # 344 at 13 (emphasis added). Jensen concedes that **the Licensing department ordered Sweet Home defendants to impose visitation restrictions. Such compulsion does not a "willful" participant make under the standard announced in Mathis** (emphasis added for purposes of citation to this text at pg.21, 25 of writ). The Ninth Circuit has held that "a plaintiff must show 'something more' than state compulsion in order to hold a private defendant liable as a governmental actor." Sutton, 192 F3d at 838 (emphasis added) (quoting Carey v Continental Airlines, Inc, 823 F2d 1402, 1404 (10th Cir 1987)). In other words "without some other nexus between the private entity and the government, we would expect that the private defendant is not responsible for the government's compulsion." Id. (emphasis in original).

Jensen attempts to overcome this compulsion obstacle by asserting such a "nexus" between Sweet Home defendants

and state defendants: Jensen appears to argue that the State defendants' order (requiring visitation restrictions be drafted and enforced by Sweet Home defendants) was merely a charade. In reality according to Jensen, Sweet Home defendants freely

* page 14 *

conspired with state defendants by recommending, drafting and imposing such restrictions maliciously to prevent Jensen from visiting his mother. Doc # 344 at 9-13 (stating that "[t]here is no doubt that [s]tate defendants agreed with * * * Sweet Home to impose the visitation restrictions * * *). Jensen's conclusions and speculations about such a conspiracy, however, are insufficient. To raise genuine issues of fact and defeat summary judgment, he must provide significant, probative and admissible evidence supporting such allegations. Thornhill Publishing Co, Inc, 594 F2d at 738.

To call the evidence put forward by Jensen in support (sic) this alleged "meeting of the minds" between state defendants and Sweet Home defendants sparse would be an understatement. First Jensen provides e-mails that were sent amongst his siblings which state their displeasure with Jensen's conduct and their desire to regulate his visitations with their mother. Doc. # 342, Ex A at 57-63, 69-72, 75. **Included in these e-mails are statements regarding conversations the siblings apparently had with employees of DSS and Licensing Division** (emphasis added for purposes of citation to this text at pg.10, n.12 of writ). Id. **Not only are these e-mails inadmissible hearsay under FRE 802, but more importantly, they offer no evidence regarding any "meeting of the minds" between state defendants and Sweet Home defendants** (emphasis added for purposes of citation to this text at pg.27 of writ).

Next, Jensen seizes upon a single sentence in the text of **the visitation restrictions faxed to him by Sweet Home defendants on April 3, 2000**. (emphasis added for purposes

of citation to this text at pg.11, n.13 of writ). Id, Ex A at 94-95. At the bottom of the restrictions page, Mostrales, who had apparently drafted the visitation restrictions, included the following phrase: **"Done in compliance with the directions and advice of [DSS employees]."** (emphasis added for purposes of citation to this text at pg.11, n.14 of writ) Id

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at 95 (emphasis added). Jensen asserts that this sentence undoubtedly proves a connivance between Sweet home defendants and state defendants to prevent him from visiting his mother. The court disagrees. All this proves is that DSS ordered Sweet Home to draft these visitation restrictions and Sweet Home followed that order. This single sentence, besides being completely innocuous, is hardly the character of probative evidence required to survive a motion for summary judgment.

The remainder of Jensen's opposition is replete with vague and conclusory statements regarding how he has "unambiguously" proven a conspiracy between Sweet Home defendants and state defendants. Doc # 344 at 15-18. Using the word "conspiracy" repeatedly and making unsupported legal conclusions that a conspiracy existed is insufficient to prove such a claim. See Karim-Panahi v Los Angeles Police Dep't, 839 F2d 621, 626 (9th Cir. 1988).

In Short, Jensen has come forward with no probative evidence showing that Sweet Home defendants acted "willingly" with state defendants to impose visitation restrictions upon him. Rather, he concedes that **Sweet Home's visitation restrictions were solely the product of government compulsion** (emphasis added for purposes of citation to this text at pg.21, 25 of writ). Under the Sutton standard, Sweet Home defendants cannot be liable as a government actor, and thus no § 1983 can attach to them. Because the court finds that Sweet Home defendants were not acting under color of state law, it need not reach the issue whether Sweet Home defendants deprived Jensen of a

constitutional or statutory right.

Accordingly, Sweet Home defendants' motion for summary judgment on Jensen's § 1983 claim is GRANTED.

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B

The Unruh Act provides, in relevant part, that "all persons within [California] * * * no matter what their sex, race, color, religion, ancestry, national origin, disability or medical condition are entitled to the full and equal accommodations, advantages, facilities, privileges, or services in all business establishments of every kind whatsoever." Cal Civ Code § 51(b) (emphasis added). The term "disability" encompasses mental disabilities, "such as mental retardation, organic brain syndrome, emotional or mental illness, or specific learning disabilities, that limit a major life activity." Cal Civ Code § 51(e)(1); Cal Gov't Code § 12926(I)(1). Moreover, the Unruh Act does not require a plaintiff actually to be mentally disabled in order to invoke the protection of the Act. Rather, "being regarded as or treated * * * as having, or having had, any medical condition that makes achievement of a major life activity difficult" is sufficient to place a plaintiff in a protected class for the purposes of Unruh Act liability. Cal Gov't Code § 12926 (I)(5).

While the language of the Unruh Act appears to paint with broad strokes, the California courts have placed two significant limitations on the scope of the Act.

First, courts have held that "the Unruh Act does not prohibit discrimination against persons based on their conduct, but only prohibits that discrimination resulting from the individual's membership in a particular class of persons." Cloutier v Prudential Insurance Co of America , 964 F Supp 2d 299, 304 (ND Cal 1997) (emphasis added) (citing Gayer v Polk Gulch, Inc, 231 Cal App 3d 515, 525 (19991)). Accordingly, a business entity is

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not liable for discriminating against a plaintiff, who happens to be a member of a suspect class, so long as such discrimination is based upon the plaintiff's inappropriate conduct (as judged by the defendant business) and not based upon his class membership.

Next, the California Supreme Court has held that the Unruh Act prohibits only "arbitrar[y]" discrimination based upon an individual's class membership. In Re Cox, 3 Cal 3d 205, 217 (1970) Accordingly, "a business establishment may, of course promulgate reasonable deportment regulations that are rationally related to the services performed and the facilities provided." Id. This second limitation on the scope of the Unruh Act was reaffirmed in Marina Point, Ltd v Wolfson, 30 Cal 3d 721 (1982). In Marina Point, the California Supreme Court stated:

> As our decision [] in Cox * * * teache[s], although entrepreneurs unquestionably possess broad authority to protect their enterprises from improper and disruptive behavior, under the Unruh Act entrepreneurs must generally exercise this legitimate interest directly by excluding those persons who are in fact disruptive .
> Id at 740 (emphasis added).

Accordingly, a business entity may legally exclude an individual based upon his class membership, so long as such exclusion is reasonably based upon the services and facilities provided by the business.

Jensen claims that Sweet Home defendants perceived him as a mentally disabled individual, a misperception according to Jensen, and that based upon this misperception, they denied him access to the Sweet Home facilities in violation of the Unruh Act.

Sweet Home defendants are entitled to summary judgment on this claim. As explained above in the court's analysis of Jensen's

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§ 1983 claim, Sweet Home defendants were compelled by state defendants to impose visitation restrictions on Jensen and Jensen has come forward with no probative or admissible evidence negating such a finding of compulsion. Accordingly, because Sweet Home defendants were clearly acting under state order in imposing visitation restrictions on Jensen, no jury could fairly find that Sweet Home defendants were arbitrarily imposing such restrictions voluntarily based on their misperception of Jensen's mental disability.

It is important to note that this case has finally reached the summary judgment phase of litigation and Jensen is no longer afforded the lu8xery of having his allegations assumed to be true, as he did in the motion to dismiss phase. Although Jensen is entitled to have his evidence viewed in the most favorable light, he must come forward with something to back up his claims. He has not done so.

The undisputable fact is that, on April 3, 2000, Sweet Home defendants placed visitation restrictions on Jensen pursuant to state defendants' direction. Jensen's speculative (if not delusional) assertion that such restrictions were imposed in accordance with an overarching government conspiracy or based solely upon misperceptions of his mental health are wholly unsupported by any probative evidence and thus cannot establish a genuine issue of material fact.

Accordingly, Sweet Home defendants' motion for summary judgment on Jensen's Unruh Act claim is GRANTED.

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VI

Kaiser Defendants

Jensen sues Kaiser defendants, namely Dr. Jue, alleging a violation of the Unruh Act. The following undisputed facts are relevant for purposes of Jensen's Unruh Act claim against

Kasier defendants.

In April 1999, Jensen, who has no medical training, came to believe that his mother was suffering from a urinary tract infection (UTI). Doc. # 342 at 2. Apparently under the direction of Jensen, Dr. Jue conducted a urinalysis Jensen's mother, which tested positive for the presence of bacteria. Id. **Dr. Jue, however, noticed that Jensen's mother was suffering from no clinical symptoms of UTI, such as fever, burning pain with urination.** (emphasis added for purposes of citation to this text at page 29, n.28 of writ). Doc # 324, ¶ 2 (Jue Declaration). Accordingly, Dr. Jue explained to Jensen that his mother was not suffering from UTI and that the bacteria in his mother's urine was called "asymptomatic bacteriuria," which is very common in the elderly patients. Id. **Dr. Jue explained that this type of bacteria is not treatable with antibiotics absent some clinical symptoms of UTI,** (emphasis added for purposes of citation to this text at page 25 of writ). and thus Dr. Jue refused, despite Jensen's urging, to prescribe antibiotics for Jensen's mother. Id. Dr. Jue explained this diagnosis to Beth Wells and she agreed with Dr Jues's recommendations. Id. Jensen, however strongly disagreed, and on May 26, 1999, sent Dr. Jue a letter "disagreeing with his diagnosis and reporting that his mother also suffered from suprapubic (bladder) tenderness * * * and advocated for treatment" with antibiotics. Doc. # 342 at 2. Dr. Jue, realizing that Beth Wells had durable power of attorney over her mother's medical treatment,

* page 20 *

refused to follow Jensen's medical "advice."

Based on the foregoing facts, Jensen asserts that Kaiser defendants, like Sweet Home defendants, discriminated against him based solely upon misperceptions that he was mentally disabled. SAC ¶¶ 103, 104. Jensen's confused logic is as follows: First, Jensen asserts that Jue somehow perceived him as a mentally disabled individual (though there is no evidence to this effect). Id, ¶ 102. Based on his

misperception of Jensen, Dr. Jue agreed with Sweet Home defendants (in some sort of covert conspiracy) that none of Jensen's medical reports or statements concerning his mother's health should be given credit. In furtherance of this conspiracy, **Dr. Jue refused to give credence to Jensen's belief that he had a UTI** (emphasis added for purposes of citation to this text at pg.25 n.25 of writ), thus depriving his mother of Kaiser's "services" in violation of the Unruh Act.

In short, Jensen claims that his mother was denied adequate medical services by Kaiser based upon Dr. Jue's misperception of Jensen's mental disability in violation of the Unruh Act. This convoluted argument is procedurally and substantively flawed.

Jensen is procedurally barred from asserting this claim because he does not have standing to assert his deceased mother's potential claim for denial of services. If Jensen's mother was denied equal "access" to medical "services" in violation of the Unruh Act, that is a claim only her estate is entitled to bring. Moreover, the Ninth Circuit has already stated that Jensen should not be allowed to amend his complaint to plead such a claim on behalf of his mother's estate, as such an amendment would be futile. Doc # 136 at 3.

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But assuming Jensen's claim were procedurally proper, and even assuming his mother had been denied equal access to services based upon her hypothetical membership in the protected class of perhaps, "elderly sick mother with misperceived mentally ill sons." Kaiser defendants would still be entitled to summary judgment on this Unruh Act claim. As mentioned above, a business entity may legally exclude an individual based upon her class membership, so long as such exclusion is reasonably based upon the services and facilities provided by the business. Marina point, 30 Cal 3d at 470. Dr. Jue's diagnosis of Jensen's mother was (1) based on Dr. Jue's training and expertise and (2) explicitly

approved by Beth Wells, who had authority over Jensen's mother's medical care. Jensen's opinion testimony to the contrary concerning his mother' medical condition is inadmissible pursuant to FRE 702, as Jensen is not an expert witness.

Nor has Jensen come forward with any admissible and probative evidence offering a genuine issue of fact regarding an alleged conspiracy between Sweet Home defendants and Dr. Jue to refuse to give credence to Jensen's medical concerns. First, Jensen purports to prove his "conspiracy" by offering a letter sent to him by his brother, Peter Jensen, which reads: "you have alienated the people at Sweet Home and the people at Kaiser." Doc # 327, Ex A at 44 (Jensen deposition). Not only is this "evidence" inadmissible hearsay under FRE 802, but more importantly, this statement shows nothing regarding a conspiracy between Sweet Home and Kaiser. **Next, Jensen offers evidence regarding a "hostile" librarian at the Kaiser facility in order to show a conspiracy:** (emphasis added for purposes of citation to this text at page 28, n.27 of writ).

> A: (Jensen): I had established a rapport with
> * page 22 *
> the librarian [at the Kaiser facility in Fremont]. She was helpful * * * . But, then one day when I appeared, she was very hostile to me.
> Q (Kaiser counsel): Okay.
> A: and after that, I knew something was going on, and I became concerned.
> Q: What do you mean she was hostile.
> A: Did she say something that was –
> A: Well, she didn't say anything. She wouldn't talk to me. She had a very hostile expression, like "go away," you know, expression on her face. And, you know, the body language was all there.

Id, Ex A at 37-38.

This deposition testimony again shows the character of 'evidence' Jensen has offered this court to prove a host of conspiracies (emphasis added for purposes of citation to this text at page 28, n.27 of writ). Jensen appears to misinterpret a single isolated incident and then build an inference upon inference in order to prove an evil conspiracy between defendants. this is not the type of probative evidence that suffices to raise a genuine issue of fact. One librarian being in a bad mood one day at work proves nothing.

Finally, Jensen claims that the court can "infer" a conspiracy simply because "Dr. Jue knows Minerva Mostrales." Id, Ex A at 51. This speculative argument borders on ridiculous and again shows the shortcomings of Jensen's case.

Accordingly, not only is Jensen's Unruh Act claim against Kaiser defendants procedurally flawed but Jensen also fails to bring forward any probative and admissible evidence to raise an issue of material fact whether Dr. Jue's refusal to give Jensen's mother a course of antibiotics was unreasonable or that Dr. Jue

* page 23 *

conspired with Sweet Home defendants.

Kaiser defendants' motion for summary judgment on Jensen's Unruh Act claim is GRANTED.

VII

State Defendants

Jensen asserts a § 1983 claim against the state defendants for alleged violations of the First and Fourteenth Amendment. According to Jensen, the Licensing Division, namely investigators Anita Gopaul (Gopaul) and Elaine Arrington (Arrington), approved and offered advice regarding the content of the visitation restrictions imposed by Sweet Home on April 3, 2000. In doing so, these state

defendants violated Jensen's **First Amendment rights "to speak freely" with his mother and his Fifth and Fourteenth Amendment Rights substantive due process right "freely [to] associat[e] [with his mother] in a familial relationship," and "his obligation of love and duty to his mother * * * ."** (emphasis added for purposes of citation to this text at pg.15 n.18 of writ). Doc # 311, ¶¶ 96-97. Jensen sues Gopaul, Arrington, and Marth (sic) Lopez (Lopez) (all DSS employees) in both their individual and official capacities. Id at ¶¶ 5-6. Inasmuch as Jensen sues these state employees in their official capacities, the suit amounts to a claim against the state agency, the DSS, and thus is a suit against the state of California. See Hawaii v. Gordon, 373 US 57, 58 (1963).

Accordingly, in analyzing Jensen's § 1983 claim, the court must analyze the claim as it (1) relates to the employees in their individual capacity and (2) relates to the state agency. The individual defendants claim they are entitled to qualified immunity on Jensen's § 1983 claim, Doc # 332, and move for summary

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judgment in their favor on this issue. The state agency asserts it is entitled to summary judgment because there is no genuine dispute of fact whether Jensen's constitutional rights were violated.

Jensen also asserts that State defendants violated Title II of the ADA, 42 USC 12101, et seq, and the RA, 29 USC 794, by discriminating against him based solely upon a perceived mental disability. Doc # 311, ¶¶ 100-105. State Defendants move for summary judgment in their favor, arguing that the visitation restrictions were imposed on Jensen for reasons completely divorced from the alleged perceived mental disability. Doc 332 at 15-17.

The court considers these claims in that order.

A

I

1983 Claim: State Officials Sued in Individual Capacity

"Government officials sued in their individual capacities under § 1983 may raise the affirmative defense of qualified immunity * * * . Qualified immunity generally protects government official in the course of performing the discretionary duties of their offices." Butler v.Elle, 291 F3d 1014, 1021 (9th Cir 2002) (citing Harlow v Fitzgerald, 457 US 800, 818 (1982)). The question of qualified immunity is a question of law to be determined by the trial court. Siegert v Gilley, 500 US 226 (1991). "The first step in evaluating a qualified immunity defense is to determine whether the plaintiff has shown that the action complained of constituted a violation of his or her constitutional rights." Butler 281 F3d at 1021 (citing Sonada v Cabrera, 255 F3d 1035 1040 (9th Cir 2001)). If the court is satisfied that a constitutional violation occurred,

"the second step is to determine: (1) whether the violated right was clearly established, and (2) whether a reasonable public official could have believed that the particular conduct at issue was lawful." Id.

Applying this legal framework to Jensen's claim, the court need not reach the second step of this inquiry because the action Jensen complains of does not constitute a violation of either his First or Fourteenth Amendment rights. **As to the First Amendment claim, it is clear that Jensen had no right to engage in free expression on Sweet Home's private property. See Hudgens v NLRB, 424 US 507, 518 (1976) (holding that picketers "have no First Amendment right" on a shopping center's private property). Since Jensen had no First Amendment rights on Sweet Home's private property, it follows that state defendants could not deprive him of this nonexistent right. Accordingly, the visitation restrictions do not constitute a**

constitutional violation and thus Gopaul, Arrington and Lopez are entitled to qualified immunity (emphasis added for purposes of citation to this text at pg.27 of writ).

The Fourteenth Amendment claim, however, presents a closer question. The Supreme court recently stated that there is some discussion in our cases of a right to maintain certain familial relationships, including association among members of an immediate family * * * ." Overton v Bazzetta, 539 US 126, 131 (2003) (citing Moore v East Cleveland, 431 US 494 (1977) (plurality opinion) and Meyer v Nebraska, 262 US 390 (1923)). The Ninth Circuit has tread into the area as yet to be entered by the Supreme Court in holding that there exists a "constitutional interest in familial companionship * * * [that] protect[s] children from unwanted state interference with their relationships with their parents." Smith v

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City of Fontana, 818 F2d 1411, 1418 (9th Cir 1987). Smith's logic applies to adult children as well as minor children, for "when * * * a child claims constitutional protection for [his] relationship with a parent, there is no custodial interest implicated, but only a companionship interest." Id at 1419. This "liberty" interest arises from the due process clause of the fourteenth Amendment. Accordingly, under Ninth Circuit precedent, Jensen had a cognizable liberty interest in the companionship of his mother that the government, in the words of the Ninth Circuit, "could not unreasonably restrict." Doc # 136 at 3 (emphasis added).

What constitutes a "reasonable" restriction of the child-parent relationship is unclear as Smith did not announce any broad principles concerning this area of law. Rather, Smith appears to endorse a case-by-case analysis approach to determine whether "state interference was 'for purposes of oppression," rather than for purpose of furthering legitimate state interest." Smith, 818 F3d at 1419 (quoting Daniels v Williams, 474 US 327, 331 (1986)). The last word from the Supreme Court on this topic came from the plurality opinion

in Moore, when Justice Powell, joined by Justices Brennen, Marshall, and Blackman, stated that "when the government intrudes on choices concerning family living arrangements, this court must examine carefully the importance of the governmental interests advanced and the extent to which they are served by the challenged regulation." Moore, 431 Us at 499 (citing Poe v Ullman, 367 US 497, 554 (1961) (Harlan, J, dissenting)). Building on the guidance offered by the Court and the Ninth Circuit, the court must first determine if state defendants' interests in imposing the visitation restrictions are

* page 27 *

legitimate. If such interests are legitimate, Moore instructs the court examine the importance of the interests and the extent to which the visitation restrictions serve the interests. In other words, whether Jensen's substantive due process rights have been "unreasonably" restricted, turns on whether the government struck a balance between the individual's constitutional right and the government's legitimate interest in some public welfare or safety.

Applying this legal standard it is clear that the state has a legitimate and very important interest in the orderly operation of nursing homes and preventing the potential abuse of its elderly citizens (emphasis added for purposes of citation to this text at pg.19, 25 of writ). The question thus becomes whether the visitation restrictions served these legitimate interests in a manner that also attempted to respect Jensen's constitutional rights.

The visitation restrictions furthered the state's legitimate interests. **State defendants offer Jensen's own admissions, made during his deposition, that he (1) changed his mother's diapers, (2) inspected the "volume, odor and appearance" of his mother's urine, (3) took his mother in a car with no seatbelts to doctor visits that were not authorized by his siblings, (4) inspected his mother's anal and vaginal areas for cleanliness, (5) began diagnosing his**

mother with illness based on his complete lack of medical training and (6) kept a sample of his mother's "purulent" mucous she had coughed up in a tissue. Doc # 334 (sic, # should be 335, declaration of Susan J. King), Ex C at 24-25, 91-92, 102-03. **Restricting Jensen's access and unsupervised contact with his mother furthers the state's important interest in preventing potential abuse** (emphasis added for purposes of citation to this text at pg.19, 25 of writ). Moreover, state defendants did not arbitrarily ignore Jensen's right of

* page 28 *

companionship with his mother. **The visitation restrictions still allowed Jensen to visit his mother (his purported only desire)** (emphasis added for purposes of citation to this text at page 25, n.25 of writ) twice a week as long as he was accompanied by another individual, while also pacifying his sibling's and Sweet Home defendants' legitimate concerns that Jensen was putting his mother in danger or doing inappropriate things to her. These restrictions were warranted and extremely reasonable for all parties involved.

The only evidence Jensen offers to show that the restrictions were reasonable are the "verified facts" contained in the SAC asserting that the restrictions were based on (1) false and defamatory statements made by his siblings and (2) the alleged conspiracy between state defendants and Sweet Home (emphasis added for purposes of citation to this text at pg.19 of writ). Doc # 344 at 8 ("plaintiff * * as alleged in the verified facts of the SAC * * * that the allegations [that] he was disruptive are false"). Id. ("[U]nder the verified facts of the complaint, the visitation restrictions were unreasonable * * * .). Doc # 342 at 8 ("Plaintiff has declared in the verified facts of the SAC * * * that the allegations that were made against him are false."). Doc # 344 at 2 ("State and Sweet Home's proffered evidence cannot controvert plaintiff's own declarations * * * including his verified facts of the SAC.").

The court has already held that Jensen has come forward with no admissible evidence showing a conspiracy between state defendants and Sweet Home defendants. See supra IV(A) at 12-13. In addition, **Jensen apparently believes that the allegations contained in the SAC, have gone through some "verification" process (a process foreign to the court), morphed into admissible evidence within the meaning proof FRCP 56(e). Jensen misses the mark,**

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as the Supreme Court has clearly held that "Rule 56() * * * requires the nonmoving party to go beyond the pleadings and * * by depositions, answers to interrogatories, and admissions on file, designate specific facts showing that there is a genuine issue for trial." Celotex 477 US at 325 (emphasis added). Accordingly, Jensen's verified "facts" are insufficient to raise a genuine issue of material fact (emphasis added for purposes of citation to this text at pg.19 of writ).

Accordingly, the court determines that Jensen's Fourteenth Amendment right to companionship with his mother was not unreasonably restricted; no reasonable jury could find otherwise. As no constitutional violation occurred, the state defendants sued in their individual capacities are entitled to summary judgment.

Even assuming arguendo that the visitation restrictions were unreasonable, and thus in violation of Jensen's constitutional rights, the state defendants are still entitled to qualified immunity because Jensen's violated rights were not "clearly established." Butler, 2281 F3d at 1021. While Smith is still good law, there is no Supreme Court case law establishing a substantive due process right of companionship between an adult child and his elderly mother. Moreover, even if such a right were clearly established, no reasonable public official would believe placing restrictions on a son's access to his elderly mother was unlawful in light of the son's siblings, both of whom had a durable power of attorney,

attempting to prevent all contact between the son and his mother. To state defendants, the visitation restrictions appeared to preserve Jensen's companionship interest with his mother, not arbitrarily destroy such interest. Accordingly no reasonable public official would have thought the particular conduct at issue

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was unlawful.

2

§1983 Claim: State Agency

As described above, in order to prevail on a § 1983 claim, a plaintiff must show that he was deprived of a constitutional or statutory right by a defendant acting under color of state law. West, 487 US at 49. It is undisputed that state defendants acted under color of state law and thus the court's sole inquiry focuses on whether Jensen's constitutional rights were violated.

Fortunately, this inquiry was already conducted above in relation to the state defendants sued in their individual capacities. As stated above, Jensen had no First Amendment rights on Sweet Home's private property and the visitation restrictions imposed against Jensen were reasonable as a matter of law. As the restrictions were reasonable, the state agency's official conduct survives constitutional scrutiny and its motion for summary judgment on Jensen's § 1983 claim is GRANTED.

B

Finally, Jensen asserts that state defendants, based solely upon their misperception that he was mentally ill, discriminated against him in violation of Title II of the ADA, 42 USC 12101, et seq, and section 504 of the RA, 29 USC § 794. Doc # 311, ¶¶ 101-104.

"To prove a public program or service violates Tile II of the ADA, a plaintiff must show: (1) he is a 'qualified

* page 31 *

individual with a disability'; (2) he was either excluded from participation in or denied the benefits of a public entity's services * * * or was otherwise discriminated against by the public entity; and (3) such exclusion, denial of benefits or discrimination was by reason of his disability." Weinreich v Los Angeles County Metropolitan Transportation Authority, 114 F3d 976, 978 (1997) (quoting 42 USC § 12132) (emphasis in original).

For purpose of the ADA, the term "individual with a disability" includes those who are "regarded as" having "a physical or mental impairment that substantially limits one or more of the major life activities of such individual." 42 USC § 12102. As to the RA, Jensen and state defendants appear to dispute whether the term "individual with a disability" includes those who are merely regarded as being mentally ill. Doc # 344 at 22-23. This dispute, however, does not pertain to a material fact, for even assuming the scope of the RA extends to individuals regarded as mentally ill, Jensen has come forward with no admissible evidence regarding whether state defendants actually perceived Jensen as mentally ill.

First, Jensen again relies heavily on the "verified facts" contained in his SAC. Doc # 344 at 25 (stating that the verified facts of the SAC constitute 'direct evidence of [state defendants] discriminatory motive"). For the same reason explained

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above, **the allegations in Jensen's SAC are not "evidence" for the purposes of a motion for summary judgment** (emphasis added for purposes of citation to this text at pg.19 of writ).

Next, Jensen offers the court the following "evidence":

> Plaintiff asked several of his friends why [defendants were being mean to him]. They explained to him that because of his unhealthy appearance and sickness behavior [sic], some

> people thought he was on drugs. It became apparent to plaintiff after this revelation that there were other erroneous conclusions that were drawn by strangers. A friend in Oregon told plaintiff * * * that plaintiff looked like he had AIDS and some people asked plaintiff if he had AIDS which can also cause cognitive impairment. It also appears that some people thought that plaintiff had a mental or psychological disorder * * * as State and Sweet Home defendants did in this case. Doc # 344 at 24.

Because some "friends" and a "friend in Oregon" told him that he looked like he used drugs or appeared to be suffering from AIDS related or induced illness, Jensen reaches the conclusion that state defendants surely perceived him as being mentally ill. Such speculative and conclusory statements are inadmissible and cannot raise a genuine issue of material fact.

The court, however, need not base its decision on the absence of evidence showing whether state defendants perceived Jensen as mentally ill. For even assuming state defendants made such a misperception, they would still be entitled to summary judgment on Jensen's ADA and RA claims. As explained above, "a plaintiff proceeding under Title II of the ADA must, similar to a [s]ection 504 plaintiff, prove that the exclusion from participation in the program was solely by reason of disability." Weinreich, 114 F3d at 978-79 (emphasis added) (internal quotations and citations omitted). State defendants claim there is no genuine

dispute of material fact whether the decision to order, and approval of, **the visitation restrictions were based, partly (if not completely) on Jensen's strange and dangerous conduct, as well as his siblings' genuine concern for their mother's well-being** (emphasis added for purposes of citation to this text at pg.16 n.19). Doc # 332 at 17

("[Plaintiff] had his visits restricted because of his own bizarre and disturbing behavior.").

Accordingly, for Jensen to survive summary judgment on these claims he was required to come forward with admissible evidence establishing an issue of fact whether misperceptions regarding his mental health were the sole basis for imposing the visitation restrictions. Jensen's proffered "evidence" establishing that his misperceived mental disability was the sole reason for his exclusion, however, falls far short of meeting this requirement.

Jensen relies upon statements made by his siblings to various state and Sweet Home defendants. Doc # 344 at 25-26. For example, Peter Jensen wrote to DSS that he thought Jensen was "mentally unbalance." Doc # 311, Ex C at 1. Also, Beth Wells told Gopaul that "Tom is disruptive and unbalanced." Doc # 345, Ex. A at 5. These are simply two representative examples of several statements, all to the same effect, made by Jensen's siblings to various defendants. Moreover, Jensen offers a letter from Mostrales to state defendants stating that "it is Tom's mental and behavioral [sic] problems that prompted him to bring [his mother] to [Kaiser's office." Doc # 311, Ex C at 3 (emphasis added). The foregoing "evidence," according to Jensen, "support[s] the strong inference that discrimination on the basis of disability was determinative of the acts and decisions of [s]tate defendants."

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Doc # 344 at 25.

First, all of **these statements are hearsay within the meaning of FR 802 and Jensen has made no argument that these statements are admissible under an exception to the hearsay rule** (emphasis added for purposes of citation to this text at pg.27 of writ). But more importantly, this evidence actually belies Jensen's assertion, as Mostrales' letter to state defendants explicitly references Jensen's "behavioral problems" (i.e. his conduct), thus negating the

assertion that only Jensen's perceived mental illness was at issue in imposing the visitation restrictions.

Upon viewing all of the evidence, it is beyond dispute that **state defendants' actions were based in large part (if not entirely) on Jensen's bizarre conduct towards his mother and the anxious reactions this behavior elicited from his siblings** (emphasis added for purposes of citation to this text at pgs.16 n.19). No reasonable jury could find otherwise. Accordingly, as Jensen's perceived mental disability was not the sole basis for imposing the visitation restrictions, state defendants' motion for summary judgment on Jensen's ADA and RA claims is GRANTED.

VIII

In sum, the court DENIES Jensen's motions for reconsideration (Doc # 358), DENIES Jensen's Rule 56(f) application (Doc # 358) and GRANTS all defendants' motions for summary judgment (Docs ## 322, 329, 332).

On a side note, after four years of litigation, massive amounts of paper and numerous hours expended by all involved, the court is of the opinion that at the heart of this complicated lawsuit is a man despondent over the state of his relationship with his immediate family. It is the court's sincere hope that these

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differences are eventually healed or, at least, ameliorated. But it is not the job of the court to provide vengeance or leverage to siblings involved in familial disputes. The court believes that efforts to repair his tattered relationships will yield Jensen more promising results than litigation (emphasis added for purposes of citation to this text at pg.2, n.1 of writ).

It is so ordered.

Vaughn R. Walker
United States District Chief Judge

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

No. 05-15346
D.C. No. CV-00-03261-VRW
(Filed July 21, 2006)

Tom Jensen,

Plaintiff-Appellant,

v.

Sweet Home One Care Facility,
A business entity, et al.,

Defendants - Appellees

ORDER

Before: B. Fletcher, Trott, and Callahan, Circuit Judges

The panel has voted to deny appellant's petition for panel rehearing.

The full court has been advised of the petition for rehearing en banc and no judge has requested a vote on whether to rehear the matter en banc. See Fed.R.App.P. 35.

The petition for panel rehearing and the petition for rehearing en banc are denied.

No further filings will be accepted in this closed appeal.

FEDERAL CONSTITUTIONAL PROVISIONS

1st Amendment of the Constitution of the United States

Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for redress of grievances.

Section 1 of the 14th Amendment of the Constitution of the United States

All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

FEDERAL STATUTORY PROVISIONS

42 United States Code Section 1983

Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress, except that in any action brought against a judicial officer for any act or omission taken in such officer's judicial capacity, injunctive relief shall not be granted unless a declaratory decree was violated or declaratory relief was unavailable. For the purposes of this section, any Act of Congress applicable exclusively o the District of Columbia shall be considered a statute of the

District of Columbia.

42 United States Code Section 12132

Subject to the provisions of this title, no qualified individual with a disability shall, by reason of such disability, be excluded from participation in or be denied the benefits of the services, programs, or activities of a public entity, or be subjected to discrimination by any such entity.

STATE LAW PROVISIONS

California Civil Code Section 51

(a) This section shall be known, and may be cited, as the Unruh Civil Rights Act.

(b) All persons within the jurisdiction of this state are free and equal and no matter what their sex, race, color, religion, ancestry, national origin, disability, medical condition, marital status, or sexual orientation are entitled to the full and equal accommodations advantages, facilities, privileges, or services of all business establishments of every kind whatsoever.

(c) This section shall not be construed to confer any right or privilege on a person that is conditioned or limited by law or that is applicable alike to persons of every sex, color, race, religion, ancestry, national origin, disability, medical condition, marital status, or sexual orientation.

....

(e) For purposes of this section:

(1) "Disability" means any mental or physical disability as defined in Sections 12926 and 12926.1 of the Government Code.

....

(5) "Sex, race, color, religion, ancestry, national origin, disability, medical condition, marital status, or sexual orientation" includes the perception that the person has any particular characteristic or characteristics within the listed

categories or that the person is associated with a person who has, or is perceived to have, any particular characteristic or characteristics within the listed categories.

....

(f) A violation of the right of any individual under the Americans with Disabilities Act of 1990 (Public Law 101-336 shall also constitute a violation of this section.

California Government Code Section 12926

As used in this part in connection with unlawful practices, unless a different meaning clearly appears from the context:

(i) "Mental disability" includes, but is not limited to, all of the following:

....

(4) Being regarded or treated by the employer or other entity covered by this part as having, or having had, any mental condition that makes achievement of a major life activity difficult.

....

(B) (iii) "Major life activities" shall be broadly construed and includes physical, mental and social activities and working.

....

California Civil Code Section 52

(a) Whoever denies, aids, or incites a denial, or makes any discrimination or distinction contrary to Section 51, 51.5, or 51.6, is liable for each and every offense for the actual damages, and any amount that may be determined by a jury, or a court sitting without a jury, up to a maximum of three times the amount of actual damage but in no case less than four thousand dollars ($4,000), and any attorney's fees that may be determined by the court in addition thereto, suffered by any person denied the rights provided in Section 51, 51.5, or 51.6. ....

California Civil Code Section 52.1

(a) if a person or persons, whether or not acting under color of law, interferes by threats intimidation, or coercion, or attempts to interfere by threats, intimidation, or coercion, with the exercise or enjoyment by any individual or individuals of rights secured by the Constitution or laws of the United States, or of the rights secured by the Constitution or laws of this state, the Attorney General, or any district attorney or city attorney may bring a civil action for injunctive and other appropriate relief in the name of the people of the State of California, in order to protect the peaceable exercise or enjoyment of the right or rights secured. An action brought by the Attorney General, any district attorney, or any city attorney may also seek a civil penalty of twenty-five thousand dollars ($25,000). If this civil penalty is requested, it shall be assessed individually against each person who is determined to have violated this section and the penalty shall be awarded to each individual whose rights under this section are determined to have been violated.

(b) Any individual whose exercise or enjoyment of rights secured by the constitution or laws of the United States, or of rights secured by the constitution or laws of this state, has been interfered with, or attempted to be interferred with, as described in subdivision (a), may institute and prosecute in his or her own name and on his or her own behalf a civil action for damages, including, but not limited to, damages under Section 52, injunctive relief, and other appropriate equitable relief to protect the peaceable exercise or enjoyment of the right or rights secured. ....

California Health and Safety Code § 1569.35

(a) Any person may request a inspection of any residential care facility for the elder in accordance with this chapter by transmitting to the department notice of an alleged violation of applicable requirements prescribed by statutes or

regulations of this state, including, but not limited to, a denial of access of any person authorized to enter the facility pursuant to Section 9722 of the Welfare and Institutions Code. A complaint may be made either orally or in writing.

....

(c) Upon receipt of a complaint, other than a complaint alleging denial of a statutory right of access to a residential care facility for the elderly, the department shall make a preliminary review and, unless the department determines that the complaint is willfully intended to harass a licensee or is without any reasonable basis, **it shall make an onsite inspection within ten days after receiving the complaint** (emphasis added for purposes of citation to this text at pg.9 of writ) except where the visit would adversely affect the licensing investigation or the investigation of other agencies, including, but not limited to, law enforcement agencies. In either event, the complainant shall be promptly informed of the departments proposed course of action. ....

California Probate Code § 4720
Durable Power of Attorney for Health Care

(Repealed by Stats.1999, c.658, (A.B.891, § 38, operative July 1, 2000, current equivalent sections, Prob. Code §§ 4682, 4684. Stats.2001, c.230 (A.B.1278) provided that designated surrogates have priority over holders of durable power of attorney. Prob.Code § 4711)

(a) Unless the durable power of attorney provides otherwise, the attorney-in-fact designated in a durable power of attorney for health care who is known to the health care provided to be available and willing to make health care decisions has priority over any other person to act for the principal in all matters of health care decisions, but **the attorney-in-fact does not have authority to make a particular health care decision if the principal is able to give informed consent with respect to that decision.**

....

(c) In exercising the authority under the durable power of attorney for health care, **the attorney-in-fact has a duty to act consistent with the desires of the principal as expressed in the durable power of attorney or otherwise made known to the attorney in fact at any time or, if the principal's desires are unknown, to act in the best interests of the principal.** ....

(emphasis added for purposes of citation to this text at pg.8 of writ).

STATE REGULATORY PROVISIONS

California Code of Regulations, Title 22, § 87572 Personal Rights

(a) Each resident shall have personal rights which include, but are not limited to the following:

....

(6) **To leave or depart from the facility at any time** and not to be locked into any room, building, or on facility premises by day or night.

....

(11) **To have his or her visitors, including Ombudspersons and advocacy representatives permitted to visit privately during reasonable hours and without prior notice,** provided that the rights of other residents are not infringed upon. ....

(emphasis added for purposes of citation to this text at pgs.11, 19, n.23 of writ).

California Code of Regulations, Title 22, § 87591 Observation of the Resident

(Register 98.No.20.5-16-98, amended 2004, to require reporting of "deterioration of mental ability")

The licensee shall regularly observe each resident for changes in physical, mental, emotional and social functioning. The licensee shall provide appropriate

assistance when such observation reveals unmet needs which might require a change in the existing level of service, or possible discharge or transfer to another type of facility. **When changes such as unusual weight gains or losses or deterioration of health condition are observed, the licensee shall document such changes and bring such changes to the attention of the resident's physician and the resident's responsible person, if any.**

(emphasis added for purposes of citation to this text at pg.19, n.23, 29 of writ).

California Code of Regulations, Title 22, § 87702
Allowable Health Conditions
(Register 97.No.20.5-16-97, amended 2001)

(a) A licensee shall be permitted to accept or retain in a Residential Care Facility for Elderly persons who have a health condition(s) which requires incidental medical services including but not limited to, those specific situations specified in Sections 87703-87715 of this chapter.

California Code of Regulations, Title 22, § 87708.
Managed Bowel and Bladder Incontinence
Register 97.No.20.5-16-97, amended 2003)

(a) The licensee shall be permitted to accept or retain a resident who has a manageable bowel and/or bladder incontinence condition under the following circumstances:

(1) the condition can be managed with any of the following:

....

(C) **A program of scheduled toileting at regular intervals.**

....

(b) In addition to Section 87702.1, General Requirements for Allowable Health Conditions, the licensee shall be responsible for the following:

(1) **Ensuring that residents who can benefit from scheduled toileting are assisted or reminded to go to the bathroom at regular intervals rather than being diapered** ....

(3) **Ensuring that incontinent residents are kept clean and dry and that the facility remains free of odors from incontinence.** ....

(emphasis added for purposes of citation to this text at pg.19, n.23 of writ).

California Code of Regulations, Title 22, § 87702.1
General Requirements for Allowable Health Conditions
(register 97. No.20.5-16-97, amended 2003)

(a) The licensee shall complete and maintain a current, written record of care for each resident that includes, but is not limited to, the following:

(1) **Documentation from the physician of the following**:

(A) Stability of the medical condition(s);

....

(C) **Method of intervention**;

....

(E) An appropriately skilled professional shall be identified who will perform the procedure if the resident needs assistance;

....

(d) **In addition to Sections 87575(a) and 87590(d) the licensee shall ensure that the resident is cared for in accordance with the physician's orders and that the resident's medical needs are met.** ....

(emphasis added for purposes of citation to this text at pg.19, n.23 of writ).

UNITED STATES DISTRICT COURT NORTHERN DISTRICT OF CALIFORNIA SAN FRANCISCO DIVISION

Dist. Ct. C-00-3261 VRW

TOM JENSEN, individually and as an advocate for the rights and interests of his mother Marguerite Jensen, a frail elderly, institutionalized person,

Plaintiff,

v.

SWEET HOME ONE CARE FACILITY, a business entity; Minerva Mostrales; Soledad Almocera; California Health and Welfare Agency (currently known as the California Health and Human Services Agency); California Department of Social Services, Community Care Licensing Div., public entities; Elaine Arrington; Anita Gopaul; Martha Lopez; Kaiser Permanente Medical Offices – Milpitas (a.k.a. Kaiser Permanente Medical Group, Inc., Kaiser Foundation Health Plan, Kaiser Foundation Hospitals) business entities; Bill Jue MD; and Does 1-10,

Defendants.

Second Amended Complaint for Damages and for Declaratory Relief for Violation of Civil, Constitutional and Statutory Rights

(filed Aug. 15, 2003)

I. JURISDICTION

This is a civil action seeking declaratory relief and damages for the deprivation under the color of law and custom of the State of California of rights secured by the Constitution of the United States, and for denial and conspiracy to deny federal constitutional and statutory rights, and state statutory rights. Jurisdiction is invoked pursuant to 28 U.S.C. §§ 1331, 1343, 1367, 2201, 2202; 42

U.S.C. §§ 1983, & 2000d-7 and the Constitution of the United States, and more particularly the First and Fourteenth Amendments thereof. Venue is proper for this judicial district pursuant to 28 U.S.C. § 1391(b).

II. INTRADISTRICT ASSIGNMENT

The Oakland Division of the District Court is proper for the trial of this action as the majority of the facts occurred within the County of Alameda. The plaintiff is informed and believes that most of the witnesses to these facts and the parties involved in this action are residents of Alameda and neighboring counties.

III. PARTIES

Plaintiff

1. The plaintiff, Tom Jensen, has a residence of record of 3090 Wayside Terrace NE, Salem, Oregon, but for the majority of the last two years lived in his motor home in Alameda County. The plaintiff's mother, Marguerite Jensen, now deceased, was ninety-two years old, had memory impairment and asthma and was an elder within the meaning of California Welfare and Institutions Code § 15610.27.

Defendants

2. Defendant SWEET HOME ONE CARE FACILITY is, on information and belief, a business partnership licensed by the State of California as a Residential Care Facility for the Elderly, and is located at 3019 Paine Court, Fremont, California. At all relevant times alleged herein the plaintiff's mother, Marguerite Jensen was a resident of said facility.

3. Defendants MINERVA MOSTRALES, and SOLEDAD ALMOCERA are, on information and belief, residents of Alameda or neighboring counties, and were at all relevant times alleged herein acting as the agents, operators, and the business partners of the business entity SWEET HOME ONE CARE FACILITY.

4. Defendant CALIFORNIA HEALTH AND WELFARE AGENCY is an agency of the state of California. Defendant CALIFORNIA DEPARTMENT OF SOCIAL SERVICES, COMMUNITY CARE LICENSING DIVISION is a division of said agency responsible for licensing and inspecting Residential Care facilities for the Elderly, and for receiving and investigating complaints of neglect and abuse of residents. The California Health and Welfare Agency is currently known as the California Health and Human Services Agency. Plaintiff also sues the agency under its new name.

5. Defendants ELAINE ARRINGTON and ANITA GOPAUL are, on information and belief, residents of Alameda or neighboring counties, and were at all times alleged herein the agents and employees of defendant CALIFORNIA DEPARTMENT OF SOCIAL SERVICES, COMMUNITY CARE LICENSING DIVISION, and in doing the things alleged herein were acting in the course and scope of said agency and employment. Said defendants are sued in both their individual and official capacities.

6. Defendant MARTHA LOPEZ is, on information and belief, a resident of the State of California, and at all relevant times alleged herein was the Deputy Director of the defendant CALIFORNIA DEPARTMENT OF SOCIAL SERVICES, COMMUNITY CARE LICENSING DIVISION, and in doing the things alleged herein was acting in the course and scope of said agency and employment. Said defendant is sued in both her individual and official capacities.

7. Defendant KAISER PERMANENTE MEDICAL OFFICES - MILPITAS is, on information and belief, a business entity, form unknown, located at 770 East Calaveras Boulevard, Milpitas, California.

8. Defendant Bill Jue MD is, on information and belief, a resident of Alameda or neighboring counties, and at all times alleged herein was an agent and employee of

defendant KAISER PERMANENTE MEDICAL OFFICES - MILPITAS, and was the primary physician of Marguerite Jensen. Kaiser defendants have appeared in this action under the names of Kaiser Foundation Health Plan, Inc., Kaiser Foundation Hospitals, and the Permanente Medical Group, Inc. Plaintiff also sues them under these names.

9. The true names and capacities, whether individual, corporate or otherwise of defendants DOES 1-10 inclusive, are not known to the plaintiff who therefore sues them by those fictitious names. The plaintiff will seek leave to amend this complaint to state their true names and capacities when they have been ascertained. Each defendant DOE is, on information and belief, legally responsible for the events and happenings referred to in this complaint and unlawfully caused the injuries and damages to the plaintiff and his mother alleged herein.

IV. FACTS

10. Beth Wells and Peter Jensen, no longer defendants in this action, are, on information and belief, residents of Alameda and San Diego counties respectively, are the children of Marguerite Jensen, the siblings of the plaintiff, and at all times alleged herein were acting as the purported agents of their mother, Marguerite Jensen, with the purported authority of a Durable Power of Attorney for her health care, and in doing the things alleged herein were doing so without the knowledge or permission and against the personal wishes and desires of Marguerite Jensen.

11. Over the course of several years, beginning in 1997, Marguerite Jensen (hereinafter referred to as Mrs. Jensen), the mother of the plaintiff, expressed to him on her own initiative repeated and consistent comments and complaints related to the circumstances of her care.

12. In the midst of such discussion by Mrs. Jensen with the plaintiff, while she was residing at defendant SWEET HOME ONE CARE FACILITY (hereinafter

referred to as SWEET HOME), defendant MINERVA MOSTRALES ordered the plaintiff not to meet with his mother in private (see Cal. Code Regs., § 87572(11)). The plaintiff reported this action to Beth Wells, but she took no action and made no comment in regard to that order.

13. The plaintiff observed that his mother appeared to have no significant signs or symptoms of asthma during his frequent visits with her at defendant SWEET HOME during 1998.

Plaintiff's Observations of Neglect of his Mother

14. During frequent visits with Mrs. Jensen beginning in April of 1999, the plaintiff observed the following circumstances of neglect of her personal and health care at defendant SWEET HOME:

15. Mrs. Jensen suffered a prolonged and untreated episode of illness characterized by episodes of severe breathing distress, chronic cough, facial features darkened by a reddish flush, a haggard and distressed appearance, weakness and fatigue, dizziness and vertigo, and confusion with light physical activity. The course of her illness spanned over three months, and during its course Mrs. Jensen coughed up a large Y-shaped mucous plug then large quantities of clear then purulent mucous. In the aftermath of her illness, Mrs. Jensen exhibited continuing signs and symptoms of breathing and other distress that she had not suffered previously.

16. The plaintiff observed negligent and improper use of and oversight of use of Mrs. Jensen's metered-dose-inhalant asthma medication by a resident caregiver of defendant SWEET HOME. The plaintiff observed a persistent white coating on his mother's tongue that was apparent for a prolonged period that the plaintiff is informed and believes was thrush, and Mrs. Jensen complained to him that she was denied her asthma medication when she felt she needed it.

17. The plaintiff observed that his mother was

reacting to asthma triggers in the defendant SWEET HOME facility, and that her signs of breathing distress would improve while she was outdoors and deteriorate when she returned to said facility. Mrs. Jensen herself commented frequently on this difference in air quality and on her favorable response to the outdoor air. The plaintiff observed that his mother's room was dusty and that the dust was not cleaned week to week. The plaintiff found an accumulation of dust and debris around the wall edge of Mrs. Jensen's bed. The HEPA air filter in her room had a coating of white dust on the pre-filter.

18. The plaintiff found his mother routinely in wet diapers when he arrived for visits, and he did not observe regular visits to the toilet sponsored for her by resident caregivers of defendant SWEET HOME. The plaintiff, by attending to his mother's toileting needs himself while visiting, found that his mother was not incontinent, but could reliably hold her urine for two hours, and would tell him when she needed to go to the bathroom. The plaintiff observed that his mother did not know how to ask for assistance from resident caregivers of defendant SWEET HOME when she needed to go to the toilet. When plaintiff inquired of his mother what she did when she needed to go to the toilet when he was not present, she replied, "I forget about it."

19. The plaintiff observed the multiple reuse of previously used disposable gloves by a resident caregiver for cleaning Mrs. Jensen after her toilet activities. He observed a resident caregiver, using said previously used gloves, clean his mother after her toilet activities by dipping her gloved fingers into a jar of water and swapping Mrs. Jensen's anal area. Said caregiver, using the same gloved hand and jar of water, then swabbed her genital area in the same manner. Another similar unsanitary practice by the same caregiver was observed by the plaintiff at another time. Said caregiver

has been the regular and principal caregiver for Mrs. Jensen at defendant SWEET HOME.

20. The plaintiff observed that his mother's personal hygiene was, for a prolonged period, neglected. She had body odor, greasy hair, and smelly feet. The plaintiff twice during this period found her feet covered by layers of scaled skin. Her breath was extremely fetid and her teeth and dentures were unclean. Mrs. Jensen complained to the plaintiff of a bad taste in her mouth, which caused her to spit out her food after she chewed it. She complained to the plaintiff about her dirty hair, and told him that she was afraid to express her needs in regard to her personal hygiene for fear of causing offense and suffering reprisal.

21. Mrs. Jensen complained repeatedly to the plaintiff that she had no activities or exercise, which lack concerned and distressed her. The plaintiff observed that this was a valid complaint, and that she spent virtually her entire day in idleness, and that her frailty constrained her own exercise of her interests in activity, and that assistance in that regard was necessary and not provided for.

22. In the midst of these observations by the plaintiff, and before he became aware of the total scope of the neglect of his mother as related herein, Mrs. Jensen confided to him that "they do things I know aren't good for me," adding that she didn't know whether to object or to go along to avoid causing offense.

23. The plaintiff informed his mother's doctor defendant BILL JUE MD, Peter Jensen and Beth Wells, and the "Patient Representative" of defendant KAISER PERMANENTE MEDICAL OFFICES - MILPITAS of his mother's health care needs, of the neglect of her care he had observed, and of Mrs. Jensen's expressions of dissatisfaction with the circumstances of her care. The plaintiff's activities in that regard, and said defendants' responses to the plaintiff's information are more fully described below.

Plaintiff's Attempts to Obtain Medical Treatment for his Mother

24. The plaintiff made two visits with his mother to her doctor defendant BILL JUE MD at defendant KAISER PERMANENTE MEDICAL OFFICES - MILPITAS, the first soon after he arrived in April of 1999 after an approximate three months absence from Mrs. Jensen's presence, and after he first observed the signs and symptoms of her illness as described in paragraph 15 above. At neither visit did defendant BILL JUE MD offer any medical opinion or diagnosis to the plaintiff, or any treatment for his patient Mrs. Jensen.

25. At one of these office visits, the plaintiff informed defendant BILL JUE MD of his concern that Mrs. Jensen was reacting to asthma triggers in the defendant SWEET HOME facility, specifically mentioning that he had found an accumulation of dust and debris around the edge and under her bed. Defendant BILL JUE MD replied that he had allergies too, and that his under-bed was probably dirty as well. The plaintiff also informed said defendant that he suspected the heating system air ducts to be a source of asthma triggers for Mrs. Jensen. Said defendant replied that he didn't believe that air ducts were cleaned, and that all that needed cleaning were air filters.

26. After the second visit to said defendant, which was after Mrs. Jensen had dislodged the mucous plug from her lungs, the clear then purulent mucous that was observed by the plaintiff was expelled by her coughing.

27. Subsequent to this sign, on July 7, and about three months after he had first observed Mrs. Jensen's signs and symptoms of illness as described in paragraph 15 above, the plaintiff took his mother to Dr. Derek Jue (coincidentally so named) of Washington Newark Medical Group in Newark. Said Dr. Jue diagnosed "bronchitis" based on plaintiff's relation of his mother's relevant history, the doctor's chest exam, and a chest x-ray. Dr. Jue prescribed antibiotics for

Mrs. Jensen.

28. At this and several subsequent office visits to Dr. Jue with his mother, the plaintiff described to the doctor some of the neglect he had observed, including defendant BILL JUE MD'S neglect to treat Mrs. Jensen, her wet diapers, and that the antibiotics he had prescribed had not been administered to her.

29. The plaintiff asked Dr. Jue to intervene with defendants BILL JUE MD, BETH WELLS, and PETER JENSEN in regard to his mother's health care needs, which he agreed to do.

Plaintiff's Reports of Neglect to Defendants Bill Jue MD and Kaiser

30. The plaintiff reported the circumstances of neglect of his mother he had observed at defendant SWEET HOME to defendant BILL JUE MD during the course of two office visits mentioned above in paragraph 24, and by three letters. The plaintiff received no reply to said letters.

31. In a letter to defendant BILL JUE MD dated May 26, 1999, the plaintiff mentioned his mother's continuing signs and symptoms of illness, and listed several of his observations of neglect of Mrs. Jensen by defendant SWEET HOME. These were her poor personal hygiene and improper incontinent care (wet diapers). The plaintiff asked said defendant to prescribe a bathroom visit schedule for Mrs. Jensen, and to "emphasize to (defendant MINERVA MOSTRALES) the need for training (of caretakers) to assure good hygiene at toilet."

32. A detailed letter dated June 24, sent by the plaintiff to defendant BILL JUE MD and delivered in person to the "Patient Representative" of defendant KAISER PERMANENTE MEDICAL OFFICES - MILPITAS, described continuing problems of neglect and continuing signs of illness of Mrs. Jensen and requested some action by the defendant KAISER PERMANENTE MEDICAL

OFFICES - MILPITAS. Among those requests were that scheduled toilet visits be prescribed for Mrs. Jensen, and that a visiting nurse be sent to the defendant SWEET HOME facility to review proper hygienic techniques for cleaning Mrs. Jensen by her caretakers after her toilet activities and to review proper techniques of use of her metered-dose-inhalant asthma medication, and to review signs of dehydration. This letter was also sent to Peter Jensen and Beth Wells, and contained the information that plaintiff suffered from long-term chronic health problems that caused him debilitating symptoms and impairments.

33. The "Patient Representative" declined to act on the plaintiff's requests enumerated in his June 24 letter, explaining to the plaintiff that defendant KAISER PERMANENTE MEDICAL OFFICES - MILPITAS attorneys had said that said defendant would not act on the plaintiff's requests because he did not possess a Durable Power of Attorney for Health Care for Mrs. Jensen.

34. At one of the office visits to defendant BILL JUE MD mentioned in paragraphs 24 and 30
above, said defendant stated to the plaintiff that he knew defendant MINERVA MOSTRALES, and further stated that she had been a "doctor" in the Philippines. The plaintiff is informed and believes that defendant MINERVA MOSTRALES is employed by the Kaiser Permanente Medical System.

Plaintiff's Reports of Neglect to Defendants Beth Wells and Peter Jensen

35. The plaintiff in the spring of 1999, after his observations of Mrs. Jensen's signs and symptoms of illness and neglect of her care at defendant Sweet Home described in paragraphs 15-21 above, arranged two meetings with his brother David Jensen, serving at the plaintiff's request as a representative of Beth Wells and Peter Jensen. At the second meeting occurring on or about the month of May, David Jensen in his role as the representative of said defendants,

denied the problems and the reports of neglect of their mother's care by defendant SWEET HOME reported to him by the plaintiff, dismissed his concerns, and stated that he and Beth Wells and Peter Jensen had adopted a posture of opposition to the plaintiff and to his reports of and attempts to remedy the neglect of their mother's personal and health care that the plaintiff had observed and reported to them.

36. At one of these meetings, the plaintiff repeated to David Jensen his suggestion of family counseling that the plaintiff had previously arranged with Dr. Grimm of the Fremont Human Services Department. This suggestion had been rejected previously by Beth Wells and Peter Jensen, and was rejected again by David Jensen in his role as a representative of said defendants.

37. After this second meeting, David Jensen in his role as representative of Beth Wells and Peter Jensen sent the plaintiff a letter dated June 24, stating that the plaintiff's "conduct had become unacceptable," and imposing restrictions and threatening further restrictions on the plaintiff's access to defendant SWEET HOME and to his mother.

38. An August 15 letter from Peter Jensen responding to the plaintiff's letters to said defendant contained the allegations that the plaintiff had "ignored" his mother for "many years," and that he "was even mean to her at times" which caused her "great heartache," and that the plaintiff had "alienated the people at Kaiser and the people at Sweet Home." This letter also contained admissions from Peter Jensen that the plaintiff had made "some valid and reasonable suggestions," and admitted that "some of your suggestions have already been implemented." The letter contained a list of proposed actions by said defendant which were based on the plaintiff's reports to him regarding their mother's care at defendant SWEET HOME. The allegations made in his letter by Peter Jensen, about the plaintiff's alleged ignoring of, and being mean to, or causing great

heartache to his mother, have no basis in fact or of reasonable interpretation of fact.

39. A September 9 letter from Peter Jensen to the plaintiff contained the allegation that the plaintiff was "disruptive of (defendant SWEET HOME) operations, particularly at mealtimes." The letter included an imputation of criminal behavior by the plaintiff, citing the plaintiff's written description of negligent toilet hygiene by Mrs. Jensen's defendant SWEET HOME caretakers, and the plaintiff's activities of tending to his mother's toileting needs. The letter issued further restrictions on the plaintiff's access to defendant SWEET HOME and to his mother, and included an order that the plaintiff not take his mother to a doctor, with the threat of calling the police and denial to the plaintiff of his access to the defendant SWEET HOME facility if he did not comply. The allegations made against the plaintiff in this letter have no basis in fact or of reasonable interpretation of fact.

40. On October 13, the plaintiff arrived at the defendant SWEET HOME facility and observed his mother showing signs of severe breathing distress. The plaintiff arranged an immediate visit to the Dr. Jue of Washington Newark Medical Group mentioned in paragraph 27 above. While he was leaving the facility defendant MINERVA MOSTRALES attempted to block the egress of the plaintiff and his mother (see Cal. Code Regs. Tit. 22, § 87572(6)).

41. A letter from Peter Jensen dated October 16, stated that the plaintiff was "denied further access to Sweet Home." Said defendant cited as his ostensible authority for his action his possession of a durable Power of Attorney for Health Care for Marguerite Jensen. This letter contained the threat to "involve the police and take formal legal action" if the plaintiff did not comply with this order. In this and in all other communication with the plaintiff mentioned in these facts above, Peter Jensen asserted his role either expressly or tacitly as a spokesman for Beth Wells. The plaintiff is

informed and believes that he did so with her express approval.

42. During all times mentioned in the facts above the plaintiff's mother, Marguerite Jensen, was a willing participant with the plaintiff in all activities they did together and gave her express or tacit approval for these activities. Mrs. Jensen repeatedly expressed her desire to see the plaintiff, her gratitude for his company and his concern for her well-being, and her desire for the activities he provided for her. Mrs. Jensen expressed herself freely to the plaintiff, did so coherently, and at all times on her own initiative.

43. The plaintiff prepared a detailed written report containing documentation and evidence of the neglect of his mother and the untreated episode of illness he had observed, and presented this written report to Ombudsman, Inc. of Alameda County and to defendant DEPARTMENT OF SOCIAL SERVICES, COMMUNITY CARE LICENSING DIVISION. This report also contained the information that plaintiff suffered from long-term chronic health problems that caused him debilitating symptoms and impairments.

44. The plaintiff is informed and believes that Ombudsman, Inc. is an agency of Alameda County, and is under the aegis of the California Health and Human Services agency. Among its responsibilities is to receive and investigate complaints of neglect and abuse of residents of Residential Care Facilities for the Elderly. Ombudsman, Inc. is not a party to this action, but the facts as pleaded below, which are related to their investigation of the plaintiff's report to them of his observations of neglect of the care of his mother are relevant to and supportive of the plaintiff's claims alleged in this complaint.

Plaintiff's Report of Neglect to Ombudsman, Inc.

45. On October 13, 1999, the plaintiff presented, in person, his written report of neglect of his mother to Ombudsman, Inc. of Alameda County. On November 19, in response to the plaintiff's inquiries about the status of their

investigation of his report to them of neglect of his mother, the plaintiff was interviewed by Jane Robinson and another employee of Ombudsman, Inc. The plaintiff, during that interview, recounted his observations of the unsanitary practices he had observed of cleaning Mrs. Jensen after her toilet activities. These were the same activities mentioned in paragraph 19 above, and were also mentioned in the plaintiff's written report to Ombudsman, Inc. Jane Robinson stated, in response to the plaintiff's verbal description of his observations, that they described "bad care."

46. A follow-up letter to this meeting sent to Jane Robinson and Julie Mills by the plaintiff asked, among other things, that Ombudsman, Inc. check Mrs. Jensen's medical and dental records to corroborate the plaintiff's reports, that a determination be made as to the responsibility of defendants BILL JUE MD and KAISER PERMEANENTE MEDICAL OFFICES - MILPITAS to have reported to the Ombudsman their "knowledge of abuse" as reported to them by the plaintiff (see Cal. Welf. & Inst. § Code 15630(b)(1)), and that the plaintiff and his mother be given relief from the denial of the plaintiff's access to the defendant SWEET HOME facility (see Cal. Code Regs., Tit. 22, § 87572(11)).

47. On or about December 3, 1999, during a scheduled phone conversation between the plaintiff and Julie Mills, the plaintiff asked her if she had read his complaint. Julie Mills replied "Not all of it. It is rather long." During this conversation Julie Mills referred the plaintiff to a Jeff Keppel, implying that his agency might be able to do an assessment of Mrs. Jensen's health status. Julie Mills did not reveal the name of Mr. Keppel's agency, and the plaintiff did not so inquire. She also discussed at length her idea that the plaintiff was suffering from "caretaker burnout." Several phone inquiries to Jeff Keppel informed the plaintiff that his agency could not do in-home health assessments, and that Julie Mills had referred the plaintiff to him for counseling

and that she had told him that the plaintiff's reports of neglect of his mother were "exaggerated" and that he was "paranoid."

48. A letter to the plaintiff from Julie Mills dated December 8, contained a "summary of action we have taken regarding your complaint." The letter stated that two visits were made to the defendant SWEET HOME facility by an "Ombudsman," and that Mrs. Jensen and another resident were interviewed by him. There was no indication that relevant facility or other records were checked, or that defendant SWEET HOME staff or administrators were interviewed. There was no indication in the letter that any of the plaintiff's reports of neglect of his mother were confirmed or denied or that any remedial action had been taken in their regard. No action was taken or comment made in regard to the plaintiff's reports of denial of his access to the defendant SWEET HOME facility and the concomitant denial of Mrs. Jensen's right to see her son.

49. The letter mentioned in the preceding paragraph further stated "after several attempts to call Dr. Jue at Kaiser, the Ombudsman was told that Kaiser cannot give out information without legal counsel permission which would take at least two weeks."

50. Among the verbal statements Julie Mills made to the plaintiff were these: the defendant SWEET HOME facility was "among the better because it didn't smell bad" and that the Ombudsman's
job "is to work with the facilities."

51. The plaintiff is informed and believes that Ombudsman, Inc. did not report the plaintiff's reports of neglect of his mother at defendant SWEET HOME "to the licensing agency by telephone as soon as possible" (see Cal. Welf. & Inst. Code § 15640(e)).

Plaintiff's Report to Defendant Department of Social Services, Community Care Licensing Div.

52. On November 5, 1999, having by then received

no report from Ombudsman, Inc., the plaintiff presented his written report of neglect of his mother, in person, to the Oakland office of defendant CALIFORNIA DEPARTMENT OF SOCIAL SERVICES, COMMUNITY CARE LICENSING DIVISION (hereinafter referred to as COMMUNITY CARE LICENSING). He was given a cursory interview by defendant ANITA GOPAUL, the person he was informed would conduct an investigation of his report of neglect of his mother. After the interview, said defendant announced that an investigation would be completed in "10 days" (see Cal. Health & Saf. Code § 1569.35).

53. On or about December 5, and after two separate inquiries regarding the status of the investigation, the plaintiff received from defendant ANITA GOPAUL a one sentence fax stating that a "10 day investigation" had been completed and that a "30 day confidential" investigation was under way.

54. On December 20, the plaintiff seeking an explanation for the delay in concluding the investigation by defendant ANITA GOPAUL, contacted defendant ELAINE ARRINGTON, the person he was told was the supervisor of defendant ANITA GOPAUL, and asked her to intervene in the investigation. After two inquiries by the plaintiff, said defendant responded by fax on December 28, promising a response to him by January 6, 2000. That promised deadline passed with no notice to the plaintiff until January 13, at which time defendant Elaine Arrington by fax promised a written response by January 21. On January 19, defendant ELAINE ARRINGTON suggested by fax a meeting to "discuss the outcome" of defendant ANITA GOPAUL'S investigation.

55. On January 28, 2000, the plaintiff met with defendants ELAINE ARRINGTON and ANITA GOPAUL. At this meeting defendant ELAINE ARRINGTON stated that they intended to present "preliminary findings," and that the plaintiff would have an opportunity to respond.

56. The plaintiff realized from the ensuing presentation by said defendants that reports of neglect of his mother that he had made in his written complaint had not been investigated, and he concluded that his written report of said neglect had not been read by either of said defendants. The plaintiff inquired directly in this regard, and defendant ANITA GOPAUL admitted that she had not read the plaintiff's written report. Said defendant stated that she was told it was "only documentation." This representation had not been made by the plaintiff. Defendant ELAINE ARRINGTON did not reply to the plaintiff's inquiry.

57. After this meeting the plaintiff gave the defendant ANITA GOPAUL a copy of a version of his written report originally submitted as already mentioned in paragraph 52 of these facts. Said defendant in accepting this report commented with hostility, "You can't expect us to read everything you send."

58. Defendant ELAINE ARRINGTON, after the admission by defendant ANITA GOPAUL that she had not read the plaintiff's written report, ordered that a new investigation be undertaken. At this order defendant ANITA GOPAUL announced, as she had done at the initial interview with plaintiff, that an investigation would be completed in "10 days." At this time she also complained that she had "twenty-two other investigations to do." The interval of time that had passed between the plaintiff's presentation of his report of neglect of his mother to defendant ANITA GOPAUL on November 5, 1999, and the day of this meeting January 28, 2000 was 64 days or nine weeks.

59. During this meeting, defendant ELAINE ARRINGTON stated to the plaintiff that he had "caused turmoil at Kaiser." Part of the preliminary findings presented by the defendants ELAINE ARRINGTON and ANITA GOPAUL were restrictions on the plaintiff's visits to his mother, and the requirement of supervision of these visits. This allegation was made and these restrictions proposed

without the investigator, defendant ANITA GOPAUL, having read the plaintiff's written complaint which is detailed and with documentation of his observations, or having interviewed or given notice to the plaintiff of any allegations that had been made against him. An adequate opportunity was not allowed at this meeting for the plaintiff to respond to the allegation that he had "caused turmoil at Kaiser," nor was the alleged "turmoil" described in any manner other than that phrase leaving the plaintiff ignorant of the substance, if any, of the allegation.

60. The plaintiff's activities in regard to "Kaiser" are summarized in this complaint in paragraphs 24-34 of these facts. At no time did the plaintiff act in any manner that can reasonably be construed to have caused "turmoil."

61. At this meeting, while discussing the plaintiff's report of negligent incontinent care of his mother (see Cal. Code Regs., Tit. 22, § 87708), the plaintiff mentioned the conduct of one of his mother's caregivers in this regard. Defendant ANITA GOPAUL expressed surprise at the plaintiff's disclosure of a caregiver of whom she was not aware. The caregiver in question was a long-standing regular caregiver at the defendant SWEET HOME facility. During this discussion, defendant ANITA GOPAUL stated that she would check for the existence of an "incontinent care plan" (see Cal. Code Regs., Tit. 22, §§ 87702.1 & 87708).

62. At this meeting, the plaintiff's report of improper use by his mother, and oversight of use by caregivers of her metered-dose-inhalant asthma medication was discussed. Defendant ANITA GOPAUL stated that she would check such use. The plaintiff, in a letter sent subsequent to this meeting to defendant ELAINE ARRINGTON, stated his concern that defendant ANITA GOPAUL was not qualified to evaluate this procedure.

63. On February 21, not having heard from the defendant COMMUNITY CARE LICENSING since February 8, the plaintiff sent a fax to defendant ELAINE

ARRINGTON requesting a reply by February 23 regarding the progress of th investigation of the plaintiff's report of neglect of his mo After that deadline passed without a reply, the plaintiff contacted the Fremont office of State Senator Liz Figueroa and asked them to intervene.

64. On March 10, the plaintiff received the "Complaint Investigation Report" by fax from defendant ELAINE ARRINGTON without any accompanying explanation. The "Complaint Investigation Report" did not indicate investigation of all the matters of neglect the plaintiff had mentioned in his written report to defendant COMMUNITY CARE LICENSING. His charge of retaliation against him for making such reports of neglect of his mother as described in these facts was not investigated. The only facility records listed as checked was the "medication log." There was no mention of an incontinent care plan as mentioned in paragraph 60 of these facts. The report indicated that barring a visitor was a violation of Mrs. Jensen's personal rights and required the defendant Sweet Home to submit a "visitation plan" to defendant COMMUNITY CARE LICENSING. The findings on other reports of neglect the plaintiff had made were listed as inconclusive and "neither confirmed nor denied." There was no indication that any remedial action was taken or ordered in regard to these matters of reported neglect.

65. The plaintiff visited his mother on March 13 for the first time since October 13, 1999, an interval of five months. He continued his visits until April 3 when he received, from defendant ELAINE ARRINGTON, a fax under the letterheads of defendant COMMUNITY CARE LICENSING and defendant SWEET HOME containing "Visitation Restrictions for Tom Jensen." Said restrictions contained a sentence "Done in compliance with the direction and advice of Anita Gopaul, LPA and Elaine Arrington, LPS of Community Care Licensing." The faxed communication from defendant ELAINE ARRINGTON containing these

"Visitation Restrictions for Tom Jensen" are attached hereto as Exhibit A and adopted and incorporated herein by this reference.

66. Said restrictions required that the plaintiff give notice to the defendant SWEET HOME facility of his visits by "registered mail by return receipt" one week in advance of his visits. His visits were to be limited to one hour only, not more than twice a week. Visits were to be conducted in a "common area only" and only in the company of one of five listed family members of the plaintiff. The plaintiff was forbidden to use a video or audio recorder. Excursions outside the facility by the plaintiff and his mother were forbidden. The letter stated that failure to abide by any of nine listed rules "will result in police being called and escort him out of the facility."

67. During one of the plaintiff's visits before receiving these restrictions, the plaintiff's mother started to cry. She said in explanation that "something happened that upset me very much." She wasn't able to say what it had been.

68. Mrs. Jensen said to the plaintiff when he was visiting during this period that she felt "a great need to be around my family." She said "That's what living is - to be around family - being part of my family's life."

69. During one such visit, Mrs. Jensen stated to the plaintiff, "I don't like to say it, but I don't even feel good." The plaintiff inquired when she did feel good and she answered, "When I'm warm enough, there's good food, and somebody to talk to."

70. During a wheelchair walk by the plaintiff with his mother to a nearby park, an activity they had engaged in regularly before the plaintiff's visits were barred, Mrs. Jensen repeatedly made comments about how she enjoyed the activity. She told her son, "I hope you don't take me back to the place where they kept me inside." She asked her son repeatedly after their return to the defendant SWEET

HOME facility how she could arrange to go on such outings and asked "who would take me?"

71. On April 6, the plaintiff by fax and certified mail asked defendant ELAINE ARRINGTON for "findings of fact or determinations" related to the restrictions imposed on his access to the defendant SWEET HOME facility and to his mother. The plaintiff also asked for "official procedures for complaint regarding and appeal of your investigation." Defendant ELAINE ARRINGTON did not reply to these requests.

72. On April 10, the plaintiff sent a fax to the Sacramento office of defendant MARTHA LOPEZ asking for "protocol" for presenting a complaint about the conduct of and appeal of the outcome of the investigation by defendants ANITA GOPAUL and ELAINE ARRINGTON.

73. A person identified as "Rea" replied from the office of defendant MARTHA LOPEZ and stated that the plaintiff's request would be forwarded to the "Regional Office."

74. The plaintiff replied on April 14, with a detailed statement of his complaint about the conduct and outcome of the investigation of his report of neglect of his mother by defendants ELAINE ARRINGTON and ANITA GOPAUL.

75. Having received no response to either his April 10 request for "protocol" or to his April 14 submission of the details of his complaint, the plaintiff on or about April 20 telephoned Rea at the Sacramento office of defendant Martha Lopez to repeat his request for "protocol." Rea hung up the telephone deliberately cutting off communication before the plaintiff could ask his questions. The plaintiff has received no communication from the defendant COMMUNITY CARE LICENSING since this last contact.

V. GENERAL CLAIMS

76. The frail, institutionalized elderly are a vulnerable and powerless minority constituting a discreet class, which is subject to abuse, neglect, oppression, and fraud by its caretakers. This class, because of the disabilities of frailty of its members, is incapable of asserting or vindicating its rights or of remedying neglect and abuse, except through willing and capable surrogates.

77. This class has suffered a history of purposeful neglect and abuse, as well as a history of neglect caused by incompetence and indifference of its caretakers. This class has been subjected to disadvantages because of its powerlessness, as well as because of the assumption by its caretakers of stereotyped characteristics and needs not truly indicative of the needs and characteristics of members of this class.

78. Because of the vulnerability of this class, and because of the inability of its members to assert their own rights and personal desires effectively in the face of neglect, abuse, or indifference, these class members are subject to discriminatory treatment denying these class members their personal rights, and their rights to care conforming to state law and regulations.

79. This class is dehumanized by attitudes, presumptions, and prejudice regarding: the value of the lives of these class members; the right of these class members to be provided with and enjoy a life they deem worth living; and the right, capacity, and need of these class members to make choices in regard to their care and activities.

80. Efforts by surrogates to redeem the rights of this class through complaints to regulatory agencies and to other responsible parties are often met with retaliation and tactics meant to hinder the surrogate complainant, and to hinder regulatory authorities in the performance of their duties.

81. Since the rights of this class can be redeemed only through surrogates, any attempt to hinder these

surrogates in making a complaint to state authorities or to others in a position of responsibility, or to hinder the state authorities in the process of investigating a report of abuse, neglect, or violation of personal rights of a member of this class is a violation of the federally protected rights of this class, and constitutes a direct and indirect denial of the equal protection and equal privileges and immunities of the law of a member of this class.

82. State agencies failing to investigate adequately or investigating negligently charges of abuse, neglect and retaliation against a complainant constitutes state action denying the rights of this class, and both directly and indirectly denies equal protection and equal privileges and immunities of the law of this class, and is a violation of the duties of a "care custodian" (see Cal. Welf. & Inst. Code §§ 15610.17(p) & 15610.07(b).

83. The lack of an equal system of administrative adjudication of complaints of abuse, neglect, and violation of personal rights of the elderly residents of RCFE's as well as other long-term care facilities for the elderly in the State of California is a burden to the vulnerable elderly, and to those who would make reports and complaints on their behalf, and creates in them a class with unequal rights.

84. This inequality encourages and enables those who would abuse, neglect, or deny personal rights to the elderly to oppress and retaliate against complainants; encourages and enables low standards of investigative inquiry by state agencies of oversight; and discourages and inhibits complainants from asserting and following through with justifiable claims of abuse, neglect, and denial of personal rights.

85. Federal law and legislative intent, and numerous federally sponsored reports and legislative hearings (see California Nursing Home Problems Persist, Sudocs NBR. GA 1.13: HEHS-98-202 & Betrayal; The Quality of Care in California, Sudocs NBR. Y 4.AG 4: S.Hrg. 105-735), and

similar California law and legislative intent and state sponsored reports and hearings (see the "Little Hoover Commission" reports: Long Term Care: Compassion Without Confusion & The Snails Pace of Reforming Residential Care Facilities for the Elderly), and legal journal articles (see Butler, A Long-Term Health Care Strategy for Legal Services, 14 Clearinghouse Rev. 613 (1980)), indicate that this class is in need of special protection and that the problems of abuse, neglect, and denial of rights of this class have been refractory to legislative attempts at remedy. These listed sources have further stated that the interests of this class are under represented in the courts (see Cal. Welf. & Inst. Code §§ 15600 (h) & (j), and that supposedly competent institutions designed to protect and vindicate the rights of this class have consistently failed to do so. Exhibit B is adopted and incorporated in this paragraph by this reference in support of this allegation.

VI. CLAIM I

VIOLATION OF CONSTITUTIONAL RIGHTS, AND CONSPIRACY TO VIOLATE CONSTITUTIONAL RIGHTS UNDER COLOR OF STATE LAW, CUSTOM, USAGE, AND POLICY - 42 U.S.C. § 1983

[Defendants California Health and Human Services Agency (formerly known as California Health and Welfare Agency); California Department of Social Services, Community Care Licensing Division; Martha Lopez, Elaine Arrington, and Anita Gopaul ("State Defendants"), Sweet Home One Care Facility, Minerva Mostrales, and Soledad Almocera ("Sweet Home Defendants").

86. The jurisdictional allegations, paragraphs 1-10, the verified Facts (paragraphs 11-75), the General Claims (paragraphs 76-85), Claim II, and Exhibits A, B, and C are adopted and incorporated in this Claim by this reference.

87. Defendants ELAINE ARRINGTON and ANITA GOPAUL acting as the agents of defendants CALIFORNIA HEALTH AND HUMAN SERVICES AGENCY, and the DEPARTMENT OF SOCIAL SERVICES, COMMUNITY CARE LICENSING DIV., pursuant to STATE DEFENDANTS' custom and policy, had a meeting of the minds, entered into an agreement with, and did conspire with defendants SWEET HOME ONE CARE FACILITY, MINERVA MOSTRALES, and SOLEDAD ALMOCERA; and unlawfully agreed to issue to, and impose upon the plaintiff, on April 3, 2000, unreasonable, unwarranted, and unlawful "Visitation Restrictions for Tom Jensen," imposing restrictions on the plaintiff's relationship with his mother, and limiting his access to the defendant SWEET HOME ONE CARE FACILITY and to his mother, and limiting and restricting plaintiff's mother's right to see her son, the plaintiff, and limiting and restricting her relationship with him. Paragraphs 64, 65, & 66 and Exhibit A are adopted and incorporated in this paragraph by this reference as support of these allegations.

88. Said restrictions were severe, onerous, and oppressive, and were meant to be a virtual bar to plaintiff's access to the defendant SWEET HOME ONE CARE FACILITY and to association with his mother, and were imposed after plaintiff had been unreasonably, unlawfully, and unjustly barred from the defendant SWEET HOME ONE CARE FACILITY in retaliation for his reports of neglect of his mother's personal and health care and his advocacy for its correction. Plaintiff remained so barred during the course of the STATE DEFENDANTS' investigations of plaintiff's reports of neglect of his mother's personal and health care and retaliation against him for reporting it, for a period of five months, preventing plaintiff from associating with his mother during this time, and depriving her of his company and protection which she desired. Plaintiff remained so barred with the agreement, meeting of the minds, and

cooperation of the STATE and SWEET HOME DEFENDANTS, and with the significant assistance of the STATE DEFENDANTS. Paragraphs 14-22, 31-34, 39, 41, 43, 46-48, 52, 53, 56, 57, 59, 60, 64, & 65, are adopted and incorporated in this paragraph by this reference as support of these allegations.

89. The "Visitation Restrictions for Tom Jensen," were issued and imposed, and the investigations by the STATE DEFENDANTS were deliberately delayed, without notice to the plaintiff, without a hearing, without valid legal authority, without a right of appeal, without just cause, and in retaliation for plaintiff's reports of neglect of his mother's care and his advocacy for its correction. Paragraphs 39, 53, 58, 59, 63-65, & 71-75 are adopted and incorporated in this paragraph by this reference as support of these allegations.

90. STATE DEFENDANTS, with deliberate indifference to plaintiff's constitutional rights, recklessly and without due process, acceded to fraudulent, defamatory, pretextual, and retaliatory allegations against plaintiff, which were made to them by SWEET HOME DEFENDANTS and by Peter Jensen and Beth Wells, and which were meant to discredit and defame him, and to discredit his reports of neglect of his mother. The reliability of the allegations against plaintiff were not questioned nor given scrutiny, while plaintiff's reports and evidence of neglect of his mother's personal and health care and retaliation against him for reporting and advocating for its correction were disregarded. Paragraphs 39, 45, 47, 48, 51, 53, 56, 59, & 64, are adopted and incorporated in this paragraph in support of this allegation by this reference.

91. The acts pursuant to the agreement, meeting of the minds, and conspiracy among these defendants are the following:

(a) Unreasonably, unjustly, and unlawfully barring plaintiff from the defendant SWEET HOME ONE CARE FACILITY for five months in violation of state regulations

while the STATE DEFENDANTS' investigations were deliberately delayed in violation of state law. Paragraphs 46, 52, & 88 are adopted and incorporated in this paragraph by this reference in support of this allegation.

(b) Issuing and imposing the unreasonable, unwarranted, and unlawful "Visitation Restrictions for Tom Jensen." Paragraphs 46, 52, & 87 are adopted and incorporated in this paragraph by this reference as support of these allegations.

(c) Issuing unreasonable and unwarranted threats of police action against plaintiff by STATE and SWEET HOME DEFENDANTS, and agreement to threats of police action by STATE DEFENDANTS to enforce plaintiff being barred unreasonably, unlawfully, and without just cause from the defendant SWEET HOME ONE CARE FACILITY during the course of the STATE DEFENDANTS' investigations, and to enforce the unreasonable, unwarranted, and unlawful "Visitation Restrictions for Tom Jensen." Paragraphs 39, 41, & Exhibit A are adopted and incorporated in this paragraph by this reference in support of these allegations.

(d) Unreasonable, unwarranted, and unlawful and intentional discrimination against plaintiff by STATE and SWEET HOME DEFENDANTS' by their failure to give due credit to, and to impeach by appeals to prejudice, plaintiff's reports and evidence of neglect of his mother by their presumption without knowing that plaintiff was disruptive, and by their agreement to false allegations that paintiff was disruptive on the basis of allegations and perceptions that plaintiff was "mentally ill," "mentally unstable," and had "mental" problems, and on the basis of erroneous assumptions and inappropriate reactions to mental disability and impairment, and to the symptoms and exigencies of plaintiff's chronic illness. And unreasonable, unwarranted, unlawful, and intentional discrimination against plaintiff by STATE DEFENDANTS by their denial of meaningful access

to STATE DEFENDANTS' services of investigation and enforcement of reported violations of state regulations in long-term care facilities, on the basis that plaintiff was perceived to have a mental disability. Paragraphs 45, 47, 58, 59, 65, 71, & 75, Exhibit C, and Claim II are adopted and incorporated in this paragraph by this reference in support of these allegations.

(e) Unreasonable and unwarranted discrimination against the elderly and their surrogate complainants. The General Claims, paragraphs 76-85; and Exhibit B are adopted and incorporated in this paragraph by this reference in support of this allegation.

92. In doing the things alleged herein, STATE DEFENDANTS acted pursuant to unreasonable, irrational, and long-standing custom and policies discriminating against, and having the effect of discriminating against, the frail institutionalized elderly, and persons reporting neglect of such persons, that subjected plaintiff's mother to an unreasonable risk that she would suffer neglect of her personal and health care, and subjected plaintiff to an unreasonable risk that he would suffer from retaliation without remedy for reporting it. In doing the things alleged herein, STATE DEFENDANTS were acting with full knowledge and deliberate indifference to a wide-spread, long-term pattern of neglect of the elderly and retaliation against complainants by California long-term care facilities, and with full knowledge that STATE DEFENDANTS' custom and policy caused or contributed to the cause of the occurrence of these things. Paragraphs 83-85, and Exhibit B are adopted and incorporated in this paragraph by this reference in support of this allegation.

93. The acts of the STATE DEFENDANTS pursuant to discriminatory state custom and policy include, but are not limited to: (a) Negligent oversight of SWEET HOME DEFENDANTS. (b) Grossly negligent or sham investigation of plaintiff's report of neglect of his mother' personal and

health care, and retaliation against him for reporting it. (c) Failure to provide any meaningful or fair process to settle disputed reports to them of neglect of personal and health care. (d) Failure to provide any remedy or avenue for relief for plaintiff's complaint about the conduct and outcome of their investigations. (e) failure to provide any penalties for SWEET HOME DEFENDANTS' violations of state regulations. (f) Failure to investigate plaintiff's charges of retaliation by SWEET HOME Defendants and Peter Jensen and Beth Wells. (g) failure to provide a remedy for retaliation and failure to adopt mandated federal law that provides such protection. Paragraphs 45-48, 50, 53, 64; the General Claims, paragraphs 76-85; and Exhibit B are adopted and incorporated in this paragraph by this reference in support of this allegation.

94. In doing these things, STATE and SWEET HOME DEFENDANTS were acting under color of state law, custom, usage and policy; acting outside the scope of their state statutory and constitutional authority; acting without state constitutional or statutory authority to issue and impose visitation restrictions and delay their investigations; acting with gross negligence with respect to the performance of their duties; and acting with deliberate indifference to plaintiff's and his mother's constitutional rights.

95. These facts as alleged, constitute violations by said defendants of the plaintiff's and his mother's federal constitutional rights, including but not limited to the First, and Fourteenth Amendments.

96. Plaintiff's First Amendment rights which were violated include, but are not limited to, the rights of the plaintiff and his mother to speak freely together and to do so privately; and their right to speak freely together, and to others, in regard to his mother's care and personal needs and desires; and plaintiff's right to advocate for correction of neglect of his mother's personal and health care and violation of her personal rights.

97. Plaintiff's Fourteenth Amendment rights which were violated include, but are not limited to, the right of plaintiff and his mother to due process in regard to the taking and restricting of their liberty interest in freely associating together in a family relationship, and their right to be free of interference in a family relationship; and the right of the plaintiff to be free of interference with his obligation of love and duty to his mother to observe her and her caretakers, and to seek to correct neglect of her health and safety and violation of her personal rights.

98. Plaintiff's Fourteenth Amendment rights which were violated also include the right to equal protection of the law. The plaintiff's and his mother's rights and interests were treated without equity and without protection of the law, which was administered unequally by STATE DEFENDANTS, who, pursuant to irrational policies, arbitrarily and unreasonably acted in favor of the interests of the opposing parties by irrationally aiding and favoring SWEET HOME DEFENDANTS and Peter Jensen and Beth Wells who had neglected plaintiff's mother's personal and health care, while irrationally punishing plaintiff for reporting and advocating for correction of neglect of her care. Paragraph 78-85 of the General Claims are adopted and incorporated in this paragraph by this reference.

99. Defendant MARTHA LOPEZ was fully informed by the plaintiff of the facts alleged herein. By failing to act to investigate and correct the violations of the plaintiff's and his mother's rights, by failing to investigate the plaintiff's allegations of gross negligence in the conduct of the investigation of the plaintiff's report of neglect of his mother by defendants ANITA GOPAUL and ELAINE ARRINGTON, and by failing to provide for procedural due process in the taking and restricting of plaintiff's and his mother's fundamental rights; said defendant was acting under color of state law and custom and policy, and demonstrated deliberate indifference to the constitutional rights of the

plaintiff and his mother; and demonstrated gross negligence in the performance of her duties. In doing these things, defendant MARTHA LOPEZ willfully and recklessly gave her consent and approval to the conduct and actions of her subordinates. Paragraphs 71-75 are adopted and incorporated in this paragraph by this reference in support of these allegations.

CLAIM II

VIOLATION OF FEDERAL AND STATE STATUTORY RIGHTS, AND CONSPIRACY TO VIOLATE STATE STATUTORY RIGHTS

Americans with Disabilities Act, 42 U.S.C. §§ 12101, et seq.; Rehabilitation Act, 29 U.S.C. §§ 701, et seq.; [Defendants California Health and Human Services Agency (formerly known as California Health and Welfare Agency); California Department of Social Services, Community Care Licensing Division; Martha Lopez, Elaine Arrington, and Anita Gopaul in their official capacities ("State Defendants")];

Unruh Civil Rights Act, California Civil Code §§ 51 et seq.; Sweet Home One Care Facility, Minerva Mostrales, and Soledad Almocera ("Sweet Home Defendants"); Bill Jue MD, Kaiser Permanente Medical Offices – Milpitas (a.k.a. Kaiser Foundation Health Plan, Inc., Kaiser Foundation Hospitals, and the Permanente Medical Group, Inc.) ("Kaiser defendants")].

100. The jurisdictional allegations, paragraphs 1-10, the verified Facts (paragraphs 11-75), the General Claims (paragraphs 76-85), Claim I, and Exhibits A, B, and C are adopted and incorporated in this Claim by this reference.

101. Plaintiff has had chronic health problems causing him to suffer significant and disabling symptoms and

physical and mental impairments since the fall of 1989. Plaintiff is disabled or handicapped within the meaning of the California and Federal disability discrimination statutes listed above, as a person having a significant physical or mental impairment interfering with a major life activity, as a person regarded as having such an impairment, or as a person with a history of having such an impairment.

102. STATE and KAISER DEFENDANTS, and Peter Jensen and Beth Wells were informed of plaintiff's chronic health problems and the disabling effects of his symptoms and impairments. Plaintiff is informed and believes that SWEET HOME DEFENDANTS were also so informed. Paragraphs 32 & 43 are adopted and incorporated in this paragraph by this reference in support of these allegations. STATE, SWEET HOME, and KAISER DEFENDANTS are recipients of federal funds.

103. STATE (42 USC §§ 12132, 29 USC § 794; 42 USC § 12203(b), 45 CFR § 80.7(e)), and SWEET HOME and KAISER DEFENDANTS (California Civil Code §§ 51, 51.5, 52 and 52.1) intentionally discriminated against plaintiff, and intimidated, threatened, and coerced him to forego the exercise of his rights, under the anti-discrimination laws listed above, on the basis of, and solely on the basis of: the perception that plaintiff had a mental disability; erroneous assumptions and inappropriate reactions to persons who are, or who are perceived to be "mentally ill," or mentally impaired; and erroneous assumptions and inappropriate reactions based on the symptoms and exigencies of plaintiff's chronic health problems.

104. The acts of STATE, SWEET HOME, and KAISER DEFENDANTS constituting intentional discrimination on the basis of, and solely on the basis of, plaintiff's disability or handicap, and the acts pursuant to a conspiracy to discriminate on the basis of, and solely on the basis of, plaintiff's disability or handicap are the following:

(a) SWEET HOME and KAISER DEFENDANTS

repeated and agreed among themselves and repeated to STATE DEFENDANTS their assumption that plaintiff was "mentally unbalanced," "mentally ill," and had "mental" problems. Exhibit C is adopted and incorporated in this paragraph by this reference in support of these allegations.

(b) On the basis of erroneous assumptions and inappropriate reactions to perceptions that plaintiff was "mentally unbalanced," "mentally ill," and had "mental" problems STATE, SWEET HOME, and KAISER DEFENDANTS intentionally did the following things: SWEET HOME and KAISER DEFENDANTS agreed not to give due credit to plaintiff's reports or evidence of neglect of his mother's personal and health care, agreed with false allegations that he was disruptive, and agreed to deny him access to SWEET HOME and KAISER DEFENDANT services of visiting and seeking medical care for his mother and to threaten him with police action to enforce their edicts. STATE DEFENDANTS denied him meaningful access to STATE DEFENDANTS' services of investigation and enforcement by failing to credit, and agreeing with SWEET HOME and KAISER DEFENDANTS and Peter Jensen and Beth Wells to not give credit or take seriously plaintiff's reports and evidence of neglect of his mother and of retaliation against him by using allegations that he had a mental disability and the symptoms and exigencies of his chronic illness as evidence that he caused "disruption" and was not credible, by agreeing with the fraudulent and pretextual allegations that were made against him in retaliation for his reports of neglect of his mother and advocacy for its correction, and by agreeing to threaten him with police action to enforce their edicts. Paragraphs 39, 41, 47, and Exhibits A and C are adopted and incorporated in this paragraph by this reference in support of these allegations.

(c) SWEET HOME and KAISER DEFENDANTS intentionally used the allegations that plaintiff was "mentally

unbalanced," "mentally ill," and had "mental" problems to justify their discriminations, or alternatively or simultaneously, to prove by discriminatory inference their fraudulent, retaliatory, and pretextual allegations that plaintiff had, inter alia, caused "disruption" at defendant SWEET HOME ONE CARE FACILITY, and "turmoil" at KAISER DEFENDANTS' facility. Paragraphs 39, 59, and Exhibit C are adopted and incorporated in this paragraph by this reference in support of these allegations.

105. The erroneous assumptions and inappropriate reactions about mental disability, and about plaintiff by STATE, SWEET HOME, and KAISER DEFENDANTS were a significant and motivating factor in the violation of plaintiff's and his mother's constitutional rights.

CLAIMS FOR RELIEF

106. The plaintiff was injured by:

(a) Anguish he experienced in regard to his concern for the health and safety and emotional well-being of his mother, and being forced to watch and wait helplessly while she suffered.

(b) Threats meant to intimidate, coerce, and induce fear in him, and causing him be intimidated, and to fear for the security of his person and for the security of his legal rights.

(c) The denial of his access to the defendant SWEET HOME facility, and to association with his mother for a period of five months and by subsequent oppressive visitation restrictions meant to be a virtual bar to his further access, causing him to be deprived of his association and obligation of love and duty to her.

(d) Injury to his reputation and family relationships by fraudulent and defamatory allegations and accusations against him, and by erroneous assumptions and inappropriate reactions about plaintiff and the symptoms and exigencies of

his chronic health problems repeated to others.

(d) Personal and financial costs associated with the process of his complaints and reports of neglect of his mother, including being forced to neglect his personal health and well being in his discharge of his duty to his mother, depriving plaintiff of his capacity to adequately manage his health problems, which caused him to suffer unnecessary pain, distress, and increased risk, and interfered with his efforts to obtain medical care.

(e) The cost of the time effort and expense spent in this controversy and developing and maintaining this legal action in his attempts to redeem his own and his mother's legal rights.

(f) His being deprived of protection by the authority and process of law, thereby depriving him of the rights, privileges, and immunities of citizenship.

107. The plaintiff has no plain, speedy, or adequate remedy at law, having been denied administrative appeal of the decisions and acts, as set forth in this complaint, of the agents of the STATE DEFENDANTS in this action.

108. Wherefore, the plaintiff requests the following relief be granted to him:

(a) That the Court declare the "Visitation Restrictions for Tom Jensen" to be null and void, and a violation of the plaintiff's federal constitutional rights.

(b) That the Court declare that the acts of fraudulent and defamatory allegations made against him, the issuance of "Visitation Restrictions for Tom Jensen," barring him from the defendant SWEET HOME facility and from free association with his mother, and the other acts set forth in this complaint are unlawful and conspiratorial acts that violated his and his mother's federal constitutional rights, and plaintiff's rights guaranteed by state law and federal law.

(c) That the Court declare that the failure of Defendants CLAIFORNIA HEALTH AND HUMAN SERVICES AGENCY, DEPARTMENT OF SOCIAL

SERVICES, COMMUNITY CARE LICENSING DIVISION, MARTHA LOPEZ, ELAINE ARRINGTON, and ANITA GOPAUL to allow the plaintiff administrative appeal, of the decisions and acts of the said defendants in regard to his report to them of neglect of his mother's care, is a violation of plaintiff's rights of due process and equal protection of the law guaranteed by the Fourteenth Amendment of he United States Constitution, and that they and any other future reporters of abuse, neglect, and denial of personal rights of residents of long-term care facilities in California are entitled by Federal law and the Constitution to a process of administrative adjudication that is equal to that granted to long-term care facilities.

(d) For statutory penalties as applicable.

(e) That cost of suit and attorney fees be awarded.

(f) That general and special damages be awarded, in the amount of not less than the sum of $250,000.

(g) That punitive damages be awarded in the amount of not less than $50,000 for each defendant. These damages are justified because the acts done by the defendants were done knowingly, maliciously, and with reckless disregard for the truth and for the constitutional rights of the plaintiff and his mother, and with reckless disregard for the health and safety of Mrs. Jensen. They are necessary to serve as a deterrent to future such actions by the defendants and by others similarly situated to them.

(h) For other and further relief as the Court may deem just and proper.

Dated: _____, By: _____

Tom Jensen,

Plaintiff in pro per

EXHIBIT A, PAGE 1

04/03/00 15:10 CA DSS CCL LIC DIV →510 471 4454 No.579
P001/002

CALIFORNIA DEPARTMENT OF SOCIAL SERVICES
COMMUNITY CARE LICENSING DIVISION
San Francisco Bay – Residential District Office
851 Traeger Avenue, Suite 360
San Bruno, CA 984066-3037
Phone Number: (650) 266-8800
Fax Number: (650) 226-8841

FAX TRANSMITTAL

DATE: 4-3-00

TO: Tom Jensen

FAX # (510) 471-4454

FROM: Elaine Arrington
(emphasis added for purposes of citation to this text at pg.11, n.13 of writ)

Number of Pages Including Cover Sheet: _____

Subject: These are the restrictions that

the facility will be

enforcing during your visits

Please call if the transmittal is incomplete. Thank you.

EXHIBIT A, PAGE 2

04/03/00 15:12 CA DSS CCL LIC DIV →510 471 4454
NO.580 P00S/002
03/13/00 15:01 510 490 1338
03/13/2000 15:01 510-490-1338 SWEET HOME CARE FACT
PAGE 02

* Attn: Elaine Arrington, LPS

Mar. 10, 2000

Sweet Home I Care Facility
3019 Paine Ct.
Fremont, CA 94555

Visitation Restrictions for Tom Jensen:

1. Visitation must be accompanied by any of the family member mentioned below:
   a. Phyllis Wells
   b. Don Wells
   c. Peter Jensen
   d. David Jensen
   e. Allan Jensen

Entry to the facility will be denied without any of the family member.

Note: He has to make every effort to communicate and coordinate with any of the family who will supervise him of his visit. Family members who was asked to supervise him will call the administrator to confirm the supervise visit.

2. He must notify Administrators, Minerva Mostrales or Soledad Almocera, in writing one week in advance of visit date and time and the family member supervising him. To ensure letter is received, letter must be mailed registered with return receipt. Sweet Home Care Facility reserves right to reschedule his visitation if one notice of visitation is not meet and if there is no supervising family member, or interfer with the residents activities, like parties and outing.

3. Visitation must be in common room only, specifically NOT bedroom or bathroom.

4. The family member supervising the visitation of Tom Jensen needs to be with him at all times during the visitation.
6. Must not take Marguerite Jensen out of the house, per Phyllis Beth Wells and Peter Jensen (with durable power of attorney).
1. Obey posted visiting hour at all times.
8. Courtesy and respect to all staff and residents at all times. Must in no way interfere with the care provider or care of anyone.
9. Must not video tape or audio tape anything during visitation, to protect the privacy of every residents and staff members.
10. Failure to abide to ay of the above will result in police being called and escort him out of the facility.

Done in compliance with the directions and advice of Anita Gopaul, LPA and Elaine Arrington, LPS of Community Care Licensing (emphasis added for purposes of citation to this text at pg.11, n.14 of writ).

cc: Anita Gopaul, LPA
Elaine Arrington, LPS
Phyllis Beth & Don Wells
Peter Jensen
David Jensen
Allan Jensen
Tom Jensen

Minerva Mostrales Fax # (510) 490 - 1138

EXHIBIT B, PAGE 1

Elder Abuse – Bureau of Medi-Cal Fraud & Elder Abuse – California Dept. of Justice – Off... Page 1 of 3

Office of the
ATTORNEY GENERAL
State of California • Department of Justice

BUREAU OF MEDI-CAL FRAUD AND ELDER ABUSE

- The United State Census Bureau projects that California's elderly population will more than double within the next 15 years, from 3.3 million to beyond 6.6 million.
- The United States General Accounting Office (USGAO) claims that more than 43 percent of all Americans over the age of 65 will reside in a nursing home sometime in their remaining lives.
- **In 1998, the USGAO reported that one in three California nursing homes was cited for serious or potentially life-threatening care problems.**
- **In 1999, the U.S. Congress's Committee on Government Reform (USCCGR) reported that only one of the 439 nursing homes in Los Angeles County was in total compliance with federal standards of care.**
- **In 2000, the USCCGR reported that only 18 of the 288 nursing homes in San Francisco Bay Area were in full or substantial compliance with federal standards of care.**
- **In 2001, the USCCGR reported that all 27 of the nursing homes in the 22nd Congressional District (Santa Barbara) violated federal health and safety standards.**

Together, these staggering statistics and projections frame the urgent need to address and remedy the poor quality of care in many of California's skilled nursing home facilities.

In response to this crisis, Attorney General Bill Lockyer

doubled the size of his elder abuse prosecution program **shortly after taking office in 1999. For the *first* time in the history of California, he directed the Bureau to use its civil, administrative, and criminal enforcement powers to bring poorly performing care facilities into compliance with federal laws governing stewardship.**

The Bureau is comprised of three programs designed to bring increased accountability to those who abuse California's elderly population.

VIOLENT CRIMES UNIT

The Violent Crimes Unit investigates and prosecutes physical elder abuse committed by individual employees against patients in elder care facilties. These crimes include:

- Homicide

EXHIBIT B, PAGE 2

Elder Abuse – Bureau of Medi-Cal Fraud & Elder Abuse – California Dept. of Justice – Off... Page 2 of 3

- Kidnapping
- Rape
- False imprisonment
- AssaultBattery (sic)

FACILITIES ENFORCEMENT TEAM

The Facilities Enforcement Team investigates and prosecutes corporate entities, such as skilled nursing homes, hospitals, and **residential care facilities**, for adopting policies or promoting practices that lead to neglect and/or poor quality of care. Institutional neglect or substandard care can take several forms, such as:

- **Failure to provide medical care for physical and mental health needs**
- **Failure to attend to hygiene concerns**
- Failure to provide adequate staffing

- Failure to prevent malnutrition and dehydration
- Falsification of patient charts

OPERATION GUARDIANS

Operation Guardians is a multi-agency task force established and led by the Attorney General to conduct surprise, on-site inspection of California's skilled nursing home facilities, which number approximately 1,500. The focus of this group is to identify and correct violations of federal, state, and/or local laws and regulations designed to protect elderly patients. The task force is comprised of regulatory and law enforcement officials, such as district attorneys, city attorneys, fire marshals, building code inspectors, ombudsmen, and health inspectors, who represent all levels of government. It also includes geriatric-care specialists from the state's top medical schools

The Bureau of Medical Fraud & Elder Abuse meets a votal (sic) need by safeguarding our elderly and dependent adults and by protecting the health care system that serves the less fortunate members of our population. Californians should rest assured that they have a committed ally and protector in the Bureau of Medical Fraud & Elder Abuse.

IF YOU SUSPECT MEDI-CAL FRAUD OF ELDER ABUSE ...
Contact the California Attorney General's Bureau of Medi-Cal Fraud and Elder Abuse Hotline.

1-800-722-0432

Or use the complaint form to report suspected violations

http://caag.state.ca.us/bmfea/elder.htm 4/9/2002

(emphasis added for purposes of citation to this text at pgs.15, n.18 of writ)

EXHIBIT C, PAGE 1

Peter Jensen
5260 Edgewater Rd.
San Diego, CA 92109

Department of Social Services
Community Care Licensing
851 Traeger Avenue, Suite 360
San Bruno, CA 9466 **November 22, 1999**

Regarding: Complaint Received on 11/05/99, Investigated 11/18/99:

I am writing this letter to address a complaint to your office made by my brother, Tom Jensen. I am writing on behalf (sic) the other 4 children in our family. We have been informed by Minerva Mostrales, Administrator of Sweet Home One Care Facility in Fremont CA, that Tom has alleged that our mother is receiving substandard care at Sweet Home One. His siblings do not agree with his allegations in the complaint and are in fact very pleased with the care she is receiving. Below I am providing some background information that I hope will be helpful to you in assessing the validity of Tom Jensen's allegations.

Sweet Home One was chosen as the board and care facility for our parents for a variety of reasons. It is a home residential facility which means a small number of residents and it has the familiar fell of a house rather than an institution. It is well kept. It has a warm, caring, and attentive staff and a competent and concerned medically trained professional, Minerva Mostrales, as the administrator.

Our mother's name is Marguerite Jensen, she is known as Peg, and she is 91 years old. She has suffered from asthma since childhood. Her dementia (loss of memory, almost completely short term and very much of her long term) has progressed gradually over the years. She has broken both of her hips on separate occasions after the age of 80 and had the joints replaced. Our father, Gerald Jensen, died in February 1998 at the age of almost 93. Our parents began their

residence at Sweet Home One in October 1997. Tom is the youngest of the five children of Peg and Gerald Jensen. The other siblings are Beth Wells, the oldest, who lives in Fremont, Peter Jensen (me) who lives in San Diego, and two younger brothers who live out of state but participate in care decisions regarding our mother.

Our sister, Beth, assumed responsibility for the care of our parents some years ago when it became evident that they were having difficulty taking care of themselves. She and her husband Don Wells have invested many hours of their lives finding the accommodations for them, taking them shopping, to the doctor, paying bills, setting up financials, etc. Beth has power of attorney for their health care and for their finances.

Tom has had serious to severe health problems for 10 years or more. He has diagnosed himself as having Chronic Fatigue Syndrome (CFS). His siblings agree that he has health problems but whether it is CFS and/or something else we do not know. **We do think he is mentally unbalanced** (emphasis added for purposes of citation to this text at pg.8 of writ). Tom estranged himself from his siblings about 8 years ago. He has complained that no one in the family will help him, however he has rejected all offers of help from his sibling and yet continues to complain that they do not help him. Tom makes his living (as we understand it) by touring swap meets in California and perhaps elsewhere. He lives in his small motor home. W think he may be getting Social Security Disability Insurance. Tom sees himself as an authority on medical matters. To give Tom his due, he is very thorough and researches carefully. In the siblings opinion, however, what he thinks he knows is much more than he really knows. Tom was very disturbed from the beginning that our parents were to be in an assisted living situation.

In the past year, Tom has made allegations of substandard care for our mother at Sweet Home and at ...

EXHIBIT C, PAGE 2

To: Beth and Don Wells
FR: Minerva Mostrales

RESPONSE

Personal Hygiene & Toilet Procedures

- She schedule to bathe 2x a week Tues. & Fri. (this is enough for elderly to prevent dryness of skin) When sometimes she refuse to bath in schedule days. We offer her the following day her everyday which most of the time she does. We wash her private part very often when she uses the bathroom/restroom.
- I personally trained my staff in bathing procedure and of course everything that needs to be done at home specially the care and supervision of all the residents.
- Diaper change usually 3-4 times a day and of course there's time when she needs to change often.
- Nobody has been rushed to do defecation nor urination.
- Elevated seat is for safety and comfort of my residents use.
- Medication: This is very important and I am particular with this issue. I do in-service my staff and in fact I don't endorsed medication procedure to my staff for new resident right away I trained them well before I endorsed it to them and check them every day. In this respect, I highly recommend that he won't interfere with this and be adviced per family. He needs to talk to Beth if he has any questions. **Otherwise he needs not to be involved specially he seemed to be mentally ill and not a trained medical personnel** (emphasis added for purposes of citation to this text at pg.8 of writ).
- Allergy Related Items: As you have noticed too, how particular I am with cleanliness and odors. He is too much and he tried to cleaned

EXHIBIT C, PAGE 3

Don't care & not concern of their mother. Tom has been Mr. Gerald and Marguerite Jensen's problem son, heart breaking to them ever since. Tom is the "family problem/ troublemaker". The black sheep of the family. Its embarassing (sic) to the family since all of them are well educated and professional.

4. Upon Marguerite Jensen admission to Sweet Home, Phyllis Beth Wells made the arrangement and signed the Facility Admission agreement on behalf of all other family members, Peter Jensen, David Jensen & Allan Jensen. We never knew nor dealt with Tom Jensen for several months, probably more than a year. He was never part of the family decisions. With this fact, we always abide with Phyllis Beth Wells and Peter Jensens' decisions for the best welfare of their mother.

5. Dr. Bill Jue of Kaiser Permanente and Dr. Jue of Fremont, Ca, strongly believed and knew that Marguerite Jensen is being cared for properly. They both knew and confirmed that **it is Tom's mental and personal behavioral problems that prompted him to bring Marguerite to their offices for any for inappropriate complaints and uneventful medical visits** (emphasis added for purposes of citation to this text at pg.8 of writ). For which he got upset with the doctors for not confirming his own made up diagnosis. He has bothered, demanded and threatened Dr. Bill Jue. For this Tom has been denied access to Kaiser premises, not allowed to bring Marguerite for any medical consultations. Securities are alerted on his presence to deal with him. Enclosed a copy of Don Wells' letter regarding his conversation with Dr. Jue.

The Ombudsman also came and investigated Sweet Home due to Tom's complaints. The family were contacted too, and conclusion of allegations was without merit. Enclosed two (2) letters from Don Wells regarding their conversations with the Ombudsman.

All the agencies involved, the family members, the medical doctors and the Ombudsman were all together against Tom's unacceptable, inappropriate behavior. We all have the duty and responsibility to protect Marguerite Jensen. So we all were working together and doing our best to protect Marguerite from detrimental effects on her mental, emotional, and physical aspect of life and give her dignity and peaceful, non-stressful life.

With all these reasons and facts mentioned with proper documentations (sic). We strongly felt that giving us a citation was unfair, unjust, discriminatory and wrongly accused for not allowing our residents to have visitors.

So, we appeal that you reconsider all these reasonable facts and evidences, regarding Anita Gopaul citation of Personal Rights.

May the Lord bless you and help you make the best and right decision, to give justice and merit for people who are sincere of serving, helping and caring for people.

Sincerely yours,

Minerva Mostrales
Licensee/Administrator

Soledad Almocera
Licensee/Administrator

(Text of Petitioner's Declaration ¶¶ 8-14. ER 157-58)

8. I became suddenly ill in the fall of 1989 with devastating symptoms, including malaise, pain, significant cognitive impairment and disabling fatigue. After becoming ill I had a series of accidents until I learned to cope with my cognitive impairments in order to reduce my risk of injuring myself and others. I have never recovered from this illness and have had frequent severe exacerbations of symptoms. For many years I could not control my pain and malaise symptoms but I do now by management of exposures to things to which I am sensitive, by periodic antibiotic treatment, and by use of several symptom relieving medications.

9. After I became so ill with devastating and life-changing symptoms, I tentatively attempted to obtain help and understanding from my siblings. I was tentative because I knew from experience with them that such help and understanding was not their strong suit and because I didn't understand at the time the cause of my illness. I was very much in need of someone to talk to and provide me with help and meaningful feedback. I made a number of attempts to talk to my brother Peter Jensen but was repeatedly rebuffed. I found I could not even broach the subject with him. Instead I received negative feedback in response to my symptom expression and sickness behavior caused by my malaise and fatigue which I could not help.

10. During a severe exacerbation I became desperate for relief from intractable pain and malaise. I resolved to go to a mountain area in my motor home to try to recuperate. I resolved that I was either going to get better or I would shoot myself. My thoughts of suicide were motivated by my severe and intractable pain and malaise and by the hopelessness of my situation. I spent three months on the mountain and during that period I substantially recuperated. I discovered while I was there that I had significant sinus inflammation that I was not aware of because it was masked by the malaise. I subsequently sought treatment for chronic sinus infection

which was a significant step toward management of my malaise and pain symptoms, as is periodic antibiotic treatment.

11. I am informed and believe that on the basis of experience and on the basis that my health problems have a genetic basis that my mother needed periodic antibiotic treatment to control her symptoms. I am informed and believe on the foregoing bases that family attention to my health problems would have helped in understanding my mother's health problems and the health problems of other family members.

12. While on the mountain I had time to reflect on my family situation and realized that I had wasted my time and energy seeking help from my siblings and that to continue to seek help from them would be fruitless and harmful to me. I realized I was entirely on my own in seeking to resolve and cope with my health problems. I resolved then out of necessity for my well-being to break my bonds with my siblings.

13. Because of my lack of a good relationship with my siblings, I did not reestablish personal contact with my parents until I learned the nature of my illness and its cause, and was able to manage my worst symptoms. I believed it would be dangerous for me to appear when I was too ill when there was no acceptance or understanding of my problems.

14.I would not have become involved in the circumstances of my mother's care but for her obvious neglect, her entreaties for my company and protection, and by my sense of duty to her. Additionally, I was fearful for her because my siblings failure of empathy and understanding of my health problems and unwillingness and inability to communicate about them indicated my mother was similarly at risk. I also became fearful for my mother after I observed that my father was left in wet diapers, and I unknowingly at the time, observed signs of his urinary tract infection that were ignored or went unobserved by his caretakers and Beth Wells, well before his infection became acute and required that my father be hospitalized.

(Text of Petitioner's Declaration ¶¶ 4-8. Doc # 360)

4. To the best of my recollection, I first visited my parents at the Sweet Home One Care Facility in December of 1997 after returning from Oregon to California for the winter. I had visited my parents at other facilities previous to their residence at Sweet Home. At the time of my first visit to them at Sweet Home, I was quite ill. While I was there my parents asked me to close the door of their room, and they both stated very emphatically that they didn't like living at the facility and asked me to find a house for them so that we could all live together. I was very distressed to hear their plea because I had to explain to them that I was then too ill to be responsible for their care. My mother cried when I said this. To the best of my recollection it was the first time I had seen her cry in my presence. I had to curtail my visit because I was so ill and because I was reacting to the indoor environment of the Sweet Home facility causing my symptoms to be exacerbated. I left the facility very distressed by the situation.

5. In the interval of time between this visit and my next contact with my mother my father had died without my knowledge of his death. I called my mother from Niland, California where it was, until then, my habit to spend the winter where I could live and work in circumstances favorable to my chronic health problems. My mother, when she answered the phone, wailed to me in emphatic distress "Where's my family ? Where's my family ?" It was explained to me at this time by the resident care-giver, "Lily," who I believe is also know as Calidad Veloria, that my father had recently died.

6. I resolved upon hearing my mother's distress, to go to the Bay Area to assess her situation and needs. When I arrived, she was very distressed and concerned about her family and her perception of isolation from it after my father's death, and she talked to me at great length about her feelings. Among the things she told me were "They don't

treat old people very well," and "I won't last long under these circumstances." Statements that caused me distress and concern for my mother's emotional well-being. It was during these talks that Defendant Minerva Mostrales ordered me not to meet with my mother in private as I have alleged in the verified facts of the First Amended Complaint in paragraph 12. It was on account of my mother's expressed distress about her sense of isolation from her family that I resolved to stay in the Bay Area and work in the flea markets there rather than return to Oregon as was my habit and preference, so that I could visit her as frequently as I was able. My mother appeared to me to be otherwise in good health with no signs or symptoms of asthma or other illness while I was visiting her frequently in 1998.

7. In the late fall of 1998 I returned to Niland and spent the winter there. I tried to maintain regular contact with my mother by phone while I was there. This was difficult and stressful for me as it was often required for me to call when I was feeling too ill to make the required effort to go to town to make the call. At these times when I was so ill I routinely misdialed the phone number and had to make multiple efforts to enter the right numbers. I was aware because of these call that my mother was coughing and having breathing difficulties for a prolonged period, and sometimes did not have enough energy to talk. This culminated when I called one day and she was in evident serious distress. Intending to reassure her and end the call because of her distress, I told her I loved her and she responded in evident emotional distress that she didn't think anybody did. I wrote a letter to Defendant Beth Wells at this time reporting these things and suggesting that my mother was ill and depressed and needed to see a doctor. See letter at Exhibit 1.

8. I resolved, on account of my mother's evident serious distress expressed over the phone, to leave Niland early to again assess her situation and needs. What I discovered when I arrived, regarding her signs of illness that were

noticeable by our phone contact, is described in paragraphs 15-17 of the First Amended Complaint [same in SAC, see note 1 of writ]. I described the circumstances in more detail in the "detailed written report containing documentation and evidence of the neglect of [plaintiff's] mother and the untreated episode of illness he observed, and presented to Ombudsman, Inc. of Alameda County and to defendant DEPARTMENT OF SOCIAL SERVICES COMMUNITY CARE LICENSING DIVISION." alleged in the First Amended Complaint [same in SAC]. See Exhibit 5 DFE 33-34.

(Text of Petitioner's 5/26/99 verified handwritten letter to Jue alleged in SAC ¶31. ER 35-36)

TO: Dr. Jue 5/26/99
FROM: Tom Jensen, regarding Marguerite Jensen

I have recently researched the subject of urinary tract infection in the elderly and have concluded that we have a difference of opinion regarding the matter of asymptomatic vs. symptomatic UTI in my mother.

My report to you during our previous office visit was the following:

Fatigue and lack of motivation

Non-asthma breathing symptoms possibly related to allergy and/or fatigue. There appears to be a problem with indoor air pollution

Diminished cognitive abilities from my recent past contacts with her

She went through a distressing illness in February or March with a persistent productive cough.

While in a convalescent facility after leg surgery, she was diagnosed and treated with antibiotics for UTI. I noticed an improvement in her sense of well being at that time.

Last year I noticed periodic episodes of malaise without fever during which she stayed in bed.

Not reported but subsequently observed:

Easy fatigueability

Lack of appetite and feeling of fullness

Reports of constipation

Pain or discomfort on pressure above her pubic bone and in her lower abdomen. Dr. Melva did confirm this at my request.

Since I arrived her appearance has improved but the fatigue and reduced cognition remains.

She enjoys the outdoors comments on the air quality and easier breathing.

I believe showing signs and symptoms of infection

and/or other distress and that she deserves treatment for UTI and further evaluation.

My father was allowed to develop an acute kidney infection. Apparently early signs and symptoms were disregarded and the hygiene was poor. I don't want that to happen to my mother.

I have noted problems with hygiene at the board and care home.

My mother has smelled bad and her feet were not clean and covered with scaly skin. I have observed unsanitary anal and genital cleaning and I have often found her sitting in wet diapers.

There is apparently no bathroom visit schedule and she is apparently too impaired to ask for assistance or find the bathroom consistently.

I have assumed toilet duties during my visits to assess the qualities of incontinence, state of hygiene and urine volume and quality.

I would like you to prescribe a bathroom visit schedule providing time for her to relax and void and evacuate comfortably. My sense of her needs is first thing in the morning, soon after meals, between meals and at bedtime.

I would also like you to emphasize to Minerva the need for training to assure good hygiene at toilet.

I have included some copies of material obtained in the Kaiser library. Please review the high-lighted items.

Tom Jensen

(emphasis added for purposes of citation to this text at pgs.3, 4, 12, 20 of writ).

(Text of Kaiser Self-Care Tips for Urinary Tract Infections, from Kaiser Permanente *Healthwise Handbook*, attached to Petitioner's 5/26/99 verified handwritten letter to Jue. ER 34)

Self-Care Tips

Urinary Tract Infections

Urinary tract infection (UTI), also called bladder infection or cystitis, is a common health problem for women, young girls, and some infant boys. It may also occur in men.

Early symptoms may include burning or pain during urination and itching or pain in the urethra (the tube that carries urine from the bladder). There may also be discomfort in the lower abdomen and a frequent urge to urinate without being able to pass much urine. Men with these symptoms may have an infection of the prostate gland. See page 193 of your *Healthwise Handbook*.

Urinary infections are generally caused by *E.Coli* bacteria, which are normally present in the digestive system. Because women have shorter urethras, they are much more susceptible to the infection than men.

Other causes of irritation to the genital area that may be associated with bladder infection include intercourse, diaphragms, wearing tight jeans or pants, bike riding, infrequent urination, perfumed soaps and powders, even spicy food.

Apply home treatment at the very first hint of irritation or painful urination. **Because the organs of the urinary tract are connected, infection can easily spread from one organ to the next. Untreated infections may spread to the kidneys and cause more serious problems.**

Prevention

- Drink more fluids; water is best
- Urinate frequently
- **Women should wipe from front to back after going to the toilet to reduce the spread of bacteria to the urethra.** Teach young girls this habit during toilet training.
- Avoid frequent douching, and do not use vaginal deodorants or perfumed feminine hygiene products.
- **Wash the genital area once a day with plain water or mild soap. Rinse well and dry thoroughly.**
- Women susceptible to urinary tract infections should urinate promptly after intercourse. Drinking extra water after intercourse may also help prevent infection.
- Wear cotton underwear, cotton lined pantyhose, and loose clothing.
- Drinking cranberry juice may protect against infection, especially in women after menopause.

(emphasis added for purpose of citation to this text at pgs.4, 12, 20 of writ)

(Text of pages 91-92 of Petitioner's Deposition Testimony. Doc # 335, Ex.C (Declaration and Exhibits of Susan J. King, Attorney for State defendant)

* page 91 *

that she was being left in wet diapers.

Q. Okay. How did you first find out that she was left in wet diapers ?

A. **Well, its related to my concern about her urinary tract infection. And I was very concerned about it. And I knew that if she was being left in wet diapers, that was not good, you know, in relation – or in relationship to either an exacerbation or cure of urinary tract infection. It was an invitation to being reinfected.**

And I asked my mother, I said, "Are you – are your diapers wet ?" And she – she couldn't tell me. She wouldn't do something that was reliable enough for me to tell. So I resolved – I was resolved, well, I'm going to check. And I was sort of shy about that, and it took me awhile before I actually did it. **But I did eventually take her to the toilet, and I looked, and there it was. You know she had wet diapers.** And then I wanted to keep track of that, to see how often it happened. And so I took – did that on a regular basis for a while and got the information I needed.

Q. Now, how did you – how did you check to see if she had wet diapers ?

A. I mean, it's there. There's yellow – yellow spot of various sizes in the absorbent material. **She**

* page 92 *

both leaked, and she also was – the diapers were in various stages of saturation (emphasis added for purposes of citation to this text at pg.19 of writ).

Q. Did you pull up her dress when you went to the bathroom with her ?

A. Well, she never – didn't wear a dress. She had pants.

Q. Did you pull down her pants ?

A. Yes I did. I changed the diaper. I took it off and then put it back on, because she was not able to do it.

Q. And did this occur in the bathroom, normally ?

A. Yes, it did.

Q. Approximately how many times did this happen ?

A. Well, I don't know. But as it developed – as it developed, what I would do is, when I went to visit her, before we went out on the wheelchair walk, I would take her to the bathroom. And the obvious reason for that was so that I wouldn't have to deal with it while we were gone. And then when we came back, I would take her again to the bathroom, and so she could go potty, you know. And that didn't necessarily involve a change of the diaper, because usually she didn't – she only one time asked me to take her to the bathroom while we were out. And a I refused to do it. I said I wouldn't do it. …

(the next page missing from State defendants' Ex.C explains that the park bathroom was unsanitary and Petitioner and his mother immediately left the park to return to Sweet Home so Petitioner's mother could use the Sweet Home bathroom).

(Text of pages 108-09 of Petitioner's Deposition Testimony. Doc # 335, Ex.C (Declaration and Exhibits of Susan J. King, Attorney for State defendants)

* page 108 *

[Petitioner's testimony on this page of his use of a thermometer to check his mother's temperature, and a stethoscope to listen to her breathing is deleted]

Q. **I've seen allegations in this case where you said that your mother was unclean in her vaginal and anal areas; is that correct ?**

A. **Yes. That's correct.**

Q. **How do you know that ?**

A. **Well, it was – because I was taking her to the toilet to change her diaper.**

Q. Did you inspect her vaginal area for cleanliness ?

A. Well, that was a misstatement. I changed that in the second amended complaint, because it was a prejudicial word. I changed it to genital.

Q. Okay, I'm sorry. We can use that term. We can use that term. That's fine. That's fine. Genital.

A. Actually it's more accurate. I was just – didn't know the right term to use.

Q. Why is it more accurate ?

A. Well, genital area covers, I think, a – it's sort of a general area, and the vaginal area is a specific –

Q. Okay.

A. -- anatomical location.

Q. Okay. So let's rephrase my question to using genital area instead.

A. **Yeah. And actually, where I saw the uncleanliness was in the – I don't know how to describe ...**

(emphasis added for purposes of citation to this text at pg.20 of writ).

(Text of pages 102-03 of Petitioner's Deposition Testimony. Doc # 335, Ex.C (Declaration and Exhibits of Susan J. King,

Attorney for State defendants)

* page 102 *

after that. And one of those occasions was when the caregiver asked me to change my mother.

Q. Okay.

A. But, you know, I want to emphasize is that – or I want to say that it, you know – and I've said it in the documents – that I was very fatigued, often very fatigued, and I wanted to go home. You know, I wanted to rest. And sometimes I'd tell my mother that, and she'd ask me to stay, and I did it. I didn't want to take on the extra work. And it would have been fine for me if they took my mother to the bathroom every two hours or whatever she needed. I wouldn't have interfered.

Q. Did you ever attempt to measure her urine volume and quality ?

A. No, but I – you know, as I was doing this process, **the first thing I wanted to know, to figure out was whether she was sitting in wet diapers. And, you know I'm a little slow, and plus, I didn't know about urinary tract infections, and I was doing research at the same time. So when I realized that it was important to check this, for somebody to check it and monitor it, because urine volume, and odor, and appearance were important** (emphasis added for purposes of citation to this text at pg.20 of writ). But I – all I did was look, you know, and I noted the volume mentally, and I looked at the color of

* page 103 *

her urine and that's all I did.

Q. Do you recall any changes in it ?

A. No, I didn't notice any abnormalities.

Q. I noticed somewhere in the documents that you

produced that it said that you, at one point, discovered that your mother was constipated.

A. Yes.

Q. How did you discover that your mother was constipated ?

A. Well, right now, I'm not exactly sure, but I think she probably told me. And a I was also wondering about bowel movements. She didn't have any bowel movements when I took her to the toilet at first. And I reported that to the doctor, and he prescribed a stool softener.

Q. Did you ever palpate her abdomen ?

A. Thanks, Fred.

(Mr. Whitaker exits.)

Well, I already described that to Ms. Yau. After I did the research, I discovered that suprapubic tenderness was a sign of urinary tract infection, so I actually palpated it, and I did it on a sort of a – every so often, I would check to see is she was – had soreness in that suprapubic bladder region.

Q. And what does – how would you palpate someone ?

(Text of pages 24-25 of Petitioner's Deposition Testimony. Doc # 335, Ex.C (Declaration and Exhibits of Susan J. King,

Attorney for State defendants)

* page 24 *

A. No

Q. No. So what was discussed with Dr. Bill Jue during this second visit ?

A. Well, the reason I went to see Dr. Jue was – yeah, this is another item that I had forgotten in detail. But its also in my diary that I record that. But it was like the -- we're going to have to go back, because I made a mistake in my memory. I think the -- I don't remember. I made some - I told something about the purulent mucus I found, and I don't remember exactly what I said.

But the chronology is, in between the first and second visit, my mother coughed up a large Y-shaped mucous plug. And I don't remember if we discussed the purulent mucus in the context of the two visits or not or something else right now. I don't remember it.

Yeah, now I remember. It was after the second visit that she coughed up the purulent mucus. And then I went to see Dr. Derek Jue. So I think I said it correctly the first time.

But between the first and second visit, my mother was coughing. And she had – every time I visited, there was a waste basket full of, you know, a pile of tissues that she used to wipe her, what she had spit up from her lungs. At this time, it was similar to what I previously told you about, the purulent mucous. She saved me a tissue wad. And I think – anyway, I opened it up, just like I did the other one, and this was a big mucus plug. It was kind of a shock to see it. And it was Y-shaped, which – you know, I've studied anatomy, and I have some – I've done a lot of reading in medical books. And I have my own

respiratory problems. So I knew the significance of this. And I knew the significance that it was Y-shaped. That meant it was fairly high up in the bronchial tree, and it blocked two separate – separate bronchi. It was into the larger bronchi where the two branched out. And it was tinged with something. I can't remember what I said. I think I said it was tinged with green or something on the end.

And that's why I went to the doctor the second time, because she coughed that up. And that's why we – that was actually the main reason we went (emphasis added for purposes of citation to this text at pgs.4, 21 of writ). But as I noted in the medical records, the doctor – I handed that to the doctor, and he threw it in the trash..

Q. He didn't even look at it ?

A. I don't remember whether he did or not. But I certainly told him about it.

(Text of 6/7/99 e-mail from Peter Jensen to David Jensen. ER 70-71)

Subject: Brother Tom
From: pljense@ibm.net
To: Hopalond@tweney.com
Date: 06-07-99, 06:28:35 PM

Dear David,

I think that the only way to drop out and go sailing is to throw your computer over the side and stay out of the country.

Well, Tom is still in Fremont. He called Beth this evening and wants her and Mama to go to counseling with him regarding Mama's care (or lack of). Needless to say this freaked Beth out. She was thinking that the three of us could meet with Tom/couneslor.

I told her no way that I would meet with Tom with a counselor. I suggested you and I might meet with Tom alone We need to keep Beth out of it as much as possible. Se we are back to the same situation of the note you sent me on 04/09.

I object to the concept that Tom can come into town, make accusations and judgments, and expect us to hop to and respond. (Too long a story to describe here.) My take is to stonewall him but Don reasons that it is too easy for him to go to Social Services and file a complaint of "elder abuse" – and I have to agree with him on that. I have a call in to Ms. Jones, the next door neighbor and family law specialist, on how to handle this. I am thinking of a restraining order on Tom. **He has been independently bringing her to Kaiser for medical treatment of "problems" which he has diagnosed, much to the distress of the Kaiser doctor.** Plus, he has been causing the problems with Mama as documented in the letter from Sweet Home. Hope to hear from Ms. Jones before I close this off.

I understand you will be arriving on Friday. We can talk on Saturday and perhaps meet tom on Sunday. I am no longer concerned about Tom's feelings on the subject. All of the rest of the siblings, plus in-laws, are in agreement with how Mama's care is being handled. **Beth and I go into high blood pressure alert every time we hear from Tom. I have had it with him jerking me (us) around.**

Well it is after 8 and Ms. Jones has not called back yet so I will close this off and update you later.

Peter

(emphasis added for purpose of citation to this text at pgs.4, 16, 27 of writ).

(Text of Petitioner's verified handwritten 6/24/99 letter to Jue alleged in SAC ¶32. ER 67-68)

TO: Dr. Jue 6/24/99
FROM: Tom Jensen, regarding Marguerite Jensen

Enclosed is material I presented to the patient representative at Kaiser Milpitas, Thursday June 24th.

I requested that it be forwarded to you.

It consists of my requests for action regarding my mother Marguerite Jensen # 7299792, and a list of my concerns regarding her care and elaborating details.

I am sending this independantly (sic) as I suspect that it may have met a dead end at the patient representatives office. They felt I had no legal standing for my requests.

The matters I bring up are serious and affect my mother's physical and emotional well-being and as such should be of concern to you.

My precious contact with you has been productive. Since you talked to Minerva, my mother's room has been dusted regularly and she is no longer frequently in wet diapers when I arrive. There do remain necessary areas of improvement as I outline in the enclosed material.

As a further example of the nature and severity of the problems I have observed, I recently noticed that one of the caregivers routinely reused latex gloves used for post-toilet cleaning. The gloves were left on the toilet tank for multiple resuse.

I observed one of the caregivers cleaning my mother's anal area then vaginal area with one of these used gloves without even washing the glove after the anal swabbing.

It is chilling to suspect that these same gloves may have been used on other residents.

As an example of family intransigence; I disclosed the used glove situation to a brother, but even in the face of this report he adamantly denied during this meeting that there were any problems or deficiencies with our

mother's care. A new box of latex gloves, however, appeared the next day (emphasis added for purposes of citation to this text at pgs.5 of writ).

I have made sure that my complaints are well-grounded in fact and that the deficiencies I report are indeed significant.

I have visited my mother regularly since I arrived sometime around the end of March and I did so also most of last year. There is no question that she benefits both physically and emotionally from these visits. I regularly take her for "walks" in her wheelchair to outings to a local park and allow her to talk freely and I read to her.

I do this often in spite of my own severe fatigue and other symptoms of illness. My sense of duty and concern for her well-being is very strong and is what motivates this letter.

I am asking your cooperation in effecting the requests I enumerate, not certainly for my benefit, but for my mother's

Since we do not have a current method of communication, you may reply to:

Tom Jensen
3090 Wayside Ter. NE
Salem, Or. 97303

P.S. I have enclosed a card for Dr. Grimm of Fremont Social Services. He has agreed to undertake family counseling.

(Text of Petitioner's verified handwritten June 1999 Audio tape transcript. Doc # 345 (Petitioner's Exhibits), Ex.A, pgs.145-146. Doc # 335, Ex.K (Declaration and Exhibits of Susan J. King, attorney for State defendants), pgs.23-24)

ITEM: Audio tape transcript
SUBJECT: Documentation of appearance of "yellow" sputum
DATE: unknown, sometime in June

M (Marguerite Jensen)
T (Tom Jensen)
[VA] sound of voice actuation

M: My speech and all isn't good ...it isn't

T: [VA] (is it) how you feel or is it ?

M: I think its how I feel

T: [VA] (you're not talking] about how you think are you ?

M: No. Maybe, I don't know. My thinking [VA] about each other

T: Well, I don't understand what you're concerned about, Mom, now.

M: Well

T: [VA] I think that's sort of what ...

M: [VA] Cough, Cough, Cough, Cough

T: But I am worried that you may have some lung infection. Let me check that out. Let me see what you've got there.

M: I'm bothered I ... I have yellow stuff (emphasis added for purpose of citation to this text at pg.5 of writ).

T: I'm going to save this for my collection. Well, this is still colors of infection, Mom.

M: Yeah it's yellow isn't it ?

T: There's worse than this ?

M: Yeah (sniffle)

T: [VA] I have a collection of your sputum, Mom. Pretty disgusting, huh ?

M: And here is some …

T: Well, I think I have enough. But, anyway I'll come back after lunch and then we'll go for a walk.

M: OK

T: We'll go out to the park where we've gone before. It should be fairly warm so we should be comfortable.

[END]

(text of letter faxed to Petitioner by Derek Jue MD on 9/13/99. ER 148)

Sent by: Wash. Newark Med. Center 510 797 0236; 09/13/99 5:58PM Jet Fax #496; Page 1/1

Washington Newark Medical Group

Part of the Washington Hospital healthcare System

Tom Jensen
3090 Wayside Terrace NE
Salem, Or 97303

Mr. Jensen

I reviewed your note and my evaluation on 7/8/99. **You did indeed bring sputum that was yellow/green in color and you did indeed report that she coughed up a mucous plug.** (emphasis added for purpose of citation to this text at pg.5 of writ).You should understand however that sputum color by itself is non diagnostic. It can be from bacterial or viral source and does not indicate the severity of the infection. Because of the suspicious X-ray, the physical exam and the history of the illness I diagnosed her with bronchitis. The fact that there was sputum did not contribute to the diagnosis.

Sincerely

Derek Jue MD

35500 Dumbarton Court • Newark, California 94560-7535 • 510/797-7535

(Text of Petitioner's verified handwritten 8/20/99 audio tape transcript. ER 15-18)

ITEM: Audio tape transcript
SUBJECT: Outburst of irritation at staff over denial of her asthma medication
DATE: August 20, 1999

[M]om: I think I could control my breathing almost completely if I had freedom to …

[T]om: Use your inhaler ?

M: Yes, the times I …

T: What you mean is you don't get it as often as you think you need it ?

M: Yes, maybe it is as often but at the wrong times then.

T: You don't get it when you really need it ?

M: Yeah … There's lots of flowers in bloom. (audible breathing symptoms)

T: I'm sorry.

M: There's lots of flowers in bloom. Which is nice. (audible breathing symptoms).

T: In there any thing else you want to say about that matter, Mom ?

M: Well, I don't know, I suppose there is but at the moment I …

T: But what ?

M: I say I suppose there is, but at the moment I can't uh …

T: Mom, my impression is that you thought you needed some of your medication and you either

couldn't communicate it or felt constrained from communicating it and you were upset about that, Is that

M: Yeah, yeah.

T: Is that what happened ?

M: Yes. I don't try, I've learned. I got treated by people who were very negative to medication

T: Who's that

M: Oh, I don't know what their names are, but

T: You mean the doctors or somebody

M: Their in the

T: Huh ?

M: In the building

T: What building are you talking about ?

M: Where I sleep.

T: Where you live ?

M: Yeah, and I don't know what the doctor's believe because they don't usually tell me things. They tell other people. But ...

T: Well, let me get this straight. You felt some breathing distress and you felt you needed medications and you couldn't get it ?

M: Well, I'd have to have a period to watch what's happening before I'd actually say it to anybody who would carry it further. But it doesn't, **I am not treated that fits the way my body is acting. They go by schedule instead of what's happening in my breathing channels and of course that sometimes makes me a little irritated. I know I need medicine but I can't get it.** Uh ...

T: Ok, Mom, I understand that and I am trying to do something about it.

M: Yeah. And you know the poor souls are hardly to blame because they've been told these and they're not going to make what they think are … Let's see, uh.

T: Well, just continue what finish what you're saying. I'll give you the coffee.

M: All right. Well now what was I saying ?

T: That's all right. That's enough.

(emphasis added for purpose of citation to this text at pg.6 of writ).

(Text of Petitioner's third (9/3/99) verified handwritten letter to Jue. ER 94-98)

Dear Dr. Jue Sept. 3, 1999

At our second of two visits to your clinic we presented with the report of a substantial bronchial plug that my mother Marguerite Jensen had coughed up. I brought that plug with me. It was y-shaped and appeared to have formed closely to the bronchi in the branch portions of the Y. The leg of the Y was tinged with an orange color.

Sometime shortly after that visit my mother began to cough up substantial quantities of yellow/green mucous. Because of you lack of response to my earlier visits and your failure to respond to a subsequent letter I sent about my mother's continuing fatigue & breathing distress as well as other symptoms indicating need for treatment, and other reasons of which you are aware, I took my mother to a doctor outside the Kaiser system for evaluation and treatment in regard to the purulent mucous & past history of cough etc.

That doctor prescribed antibiotics which I could not afterward administer without family approval. He also took a chest x-ray.

Fortunately, the purulent mucous diminished gradually as did her chronic productive cough. Coincident with those changes, her fatigue, lethargy, breathing distress and other symptoms improved as well.

She is now much improved from when I first saw her this year in March/April.

The course of her illness based on my observations was as follows:

(1) An acute episode of illness lasting several weeks in February. I was aware of this because of regular phone calls. She could not talk on the phone during most of this time. She was apparently too affected by illness and too confused to do so. She may also not have had the breath to comfortably talk.

(2) She had a chronic productive cough which may have developed before the acute episode. She would cough frequently while we were talking on the phone after the acute episode.

(3) When I arrived sometime around the first of April, she looked ill and distressed. She had obvious difficulty breathing, she still had the chronic productive cough with clear mucous. She had a runny nose which she frequently wiped a tissue and she appeared to have obstruction of her nasal passages. She appeared to be more confused and otherwise cognitively affected than during my last contact. Even mild exercise would cause breathlessness and exacerbation of cognitive symptoms.

She was lethargic and didn't "want to do anything." She had apparently spent most of her time in bed. Her face was dark and she had large shiners.

She complained of vertigo and dizziness frequently when she got up to standing. She would exhale in little staccato bursts with a huffing vocalization when she got up or sat down. She frequently pursed her lips while exhaling. Her breathing at times was very labored. With great effort apparent with inhalation. Retractions were visible ad her breathing rhythm was abnormal.

(4) Her bedside basket was always filled with used tissues when I arrived for frequent visits. I inspected one day and found the large bronchial plug previously described. This discovery I brought to our second visit to you. Sometime after this visit she began to cough up large quantities, about a teaspoonful at a time of yellow/green mucous.

(5) The purulent mucous and the chronic cough, slowly over a period of weeks, began to diminish and my mother's distressing symptoms described above began to resolve as well.

(6) She is now much improved, but I believe still affected. She has breathlessness with exercise which was not a problem I observed last year and I still see signs of stress. A second visit to the outside doctor reveal "crackle sounds in her lungs.

I am now concerned with the following:

(1) Why was the acute episode of illness and accompanying symptoms suggesting asthma flare apparently not reported and treated ?

(2) Why were my reports disregarded and my concerned attempts to receive treatment for my mother unsuccessful?

(3) Why did the apparent asthma with complications occur ?

The possible causes could have included some of the following:

Viral or other infection

Lack of treatment for asthma flare

Improperly administered and/or depleted medications

Too large and allergic stress from indoor air pollution

Lack of exercise.

(4) There appears to be no assessment and treatment plan for respiratory illness and asthma flares.

(5) There should be an assessment of her current staus and possible treatment as well as efforts to reduce her allergic load.

These concerns should be answered and dealt with in order to avoid a very likely recurrence of a similar episode this winter.

My family has denied my concerns both about the problems of our mother's health and the other deficiencies of her care.

They have, however, recently and reluctantly acknowledged that there are problems and have taken steps to resolve them.

Your acknowledgement and agreement in regard to the medical issues, I expect will motivate them to some further action.

I hope you share my concerns for my mother's well-being and are willing to cooperate in resolving them.

I would like to hear from you at the earliest possible date.

My fax # is Tom Jensen

Enclosed: 1. Chest x-ray report Wash. Hosp.
2. TB test result

(emphasis added for purposes of citation of this text at pgs.3, 6 of writ).

(Text of Mostrales' 9/8/99 diary entry. ER 102-03)

Note:

9/8/99 5:47 pm **Beth page me and I called her back. Update me that Dr. W. Jue called her and told her that Tom brought Peg to see a doctor in Washington Hospital. X-ray was taken and has finding of plueral (sic) infection "thinning of the pleura" (did not get all the information clearly).** But then noted that Peg was given antibiotics and was better. I personally did not know if Tom has been speaking to Peg while he was visiting her ? Which is unacceptable without notifying me and the other family member Beth Wells & Peter Jensen who have power of attorney over Peg's health care issues.

Dr. Jue further informed Beth, that **Kaiser has legal action regarding Tom not allowed to bring Peg to doctor's appointment nor Tom be allow Kaiser permises** (sic). Since he has no durable power of attorney for Peg's care.

In other side, since Dr. Jue received this refer regarding Peg's appointment in Washington Hospital. Dr. Jue wants to have a x-ray done on her this coming Friday 9/10/99.

note: **Dr. Jue already knew Tom's unacceptable behavior and the troubles he is creating for his mom and brother's & sister (whole family) and my facility. His family** (Jensen/Wells) **are so upset and hassled with his going unreasonable, rediculous (sic) ideas for which everybody knows Tom is a burden to everybody specially his family.** Dr. Bill Jue has spoken to me in many occasions regarding Tom's irrelevant medical complaints & issues for his mother, w/c has no significant findings.

(emphasis added for purposes of citation of this text at pgs.6-7, 27 of writ).

(Text of Mostrales' 10/13/99 diary entry. ER 104)

Oct. 13, 1999 Wed.

2:40 pm Tom came and Peg was just done with her bathroom needs. Tom as he's been doing from time to time, did check her temp. with his own thermometer. Asking his mom, how's she doing? Of course Peg [Petitioner's mother] who just woke up from her nap, might be not sounding good. He decided that Peg is not feeling well and told my caregiver that he is going to bring Peg to the doctor.

My caregiver Calidad, as (sic) been instructed by me and her (Peg's family members Beth/Don Wells and all the rest) not to allow Tom to bring their Mm to any doctor's appointment without notifying me or the rest of the family members. Calidad page me and told me that Tom wants to bring Peg to the doctor and she said she said no to him. **For the reason that Peg is not sick obviously but only Tom who is always paranoid and mentally sick**

I came to the facility right away while I was getting my thermometer and about to go to Peg's room. Tom was wheeling Peg in the wheelchair while Peg was smiling not looking sick but just was fine. Tom was wheeling her towards the main door ready to go out and I asked tom what's going on because I want to check Peg and he, in his mad voice away that, that's what is about to find out. Then paused and said, Minerva, if you have not noticed it my Mom has been very sick for about 6 months now if you have not figure it out. **So I told him, he is sick himself mentally and not his mother** and he took Peg in his RV and drove away and came back at 4:30 P.M.

(emphasis added for purposes of citation of this text at pg.7 of writ)

(Text of Gopaul's 11/5/99 Detail Supportive Information ER 109)

State of California Department of Social Services
Health and Welfare Agency Community Care Licensing

DETAIL SUPPORTIVE INFORMATION

This form is intended to document information that is relevant to the licensing file but generally not public information. This would include back-up information on deficiencies such as conditions contributing to the severity of violations, witnesses to the violations, or other observation from field notes. When used to support the Licensing Report (LIC 809) the form should be completed, signed and dated shortly after the visit. This assures accuracy and completeness of the detail of the public record.

Facility Name Facility Number Date(s) of visits
Sweet Home

Investigation follow-up: Interview with Marguerite Jensen

LPA Anita Gopaul explained the reason for the visit. LPA asked Ms. Jensen if she received personal hygiene care. Ms. Jensen said yes.

LPA Gopaul asked about the food. Ms. Jensen said the food was good.

LPA Gopaul asked Ms. Jensen if the caregivers help her with her medication. Ms. Jensen said the caregivers are always available.

LPA Gopaul asked Ms. Jensen if she wanted her son to visit her son Tom to visit. Ms. Jensen said yes and relied with a smile (emphasis added for purposes of citation of this text at pg.8 of writ).

Jensen says she likes living at the facility.

Anita Gopaul 11/5/99

(Text of 12/2/99 fax (produced by State defendants) alleged in SAC ¶ 53 sent by Gopaul to Petitioner on 12/2/99. ER 109)

CALIFORNIA DEPARTMENT OF SOCIAL SERVICES
COMMUNITY CARE LICENSING DIVISION
San Francisco Bay – Residential District Office
851 Traeger Avenue, Suite 360
San Bruno, CA 984066-3037
Phone Number: (650) 266-8800
Fax Number: (650) 226-8841

FAX TRANSMITTAL

DATE: 12-2-99

TO: Tom Jensen

FAX # (510) 471-4454

FROM: Anita Gopaul

Number of Pages Including Cover Sheet: 1

Subject: Investigation -
LPA Anita Gopaul conducted a 10-day
The investigation is pending
Another investigation required

Anticipated completion 30 days
The investigation is confidential
A finding will be faxed in approximately 30 days.

Please call if the transmittal is incomplete. Thank you.

(emphasis added for purposes of citation of this text at pg.8 of writ).

(Text of Arrington's letter faxed to Petitioner by Senator Figueroa on 03/06/2000. SAC ¶ 63. ER 125)

03/06/200 11:13 5104135965 **Senator Liz Figueroa** Page 03
02/28/02 13:22 CA DSS CCL LIC DIV → 5104135965
No.395 P001/002

State of California – Health and Human Services Agency
DEPARTMENT OF SOCIAL SERVICES
Community Care Licensing Division
851 Traeger Avenue, Suite 360
San Bruno, CA 94066-3037

February 29, 2000

Mr. Tom Jensen
Fax Number (510) 471-4454

Dear Mr. Jensen

This letter is to update you on the status of you complaint against Sweet Home.

Ms. Gopaul will have the investigation completed by 3-10-2000, and a copy of her findings will be faxed to you. Thank you for your patience in this matter.

Sincerely,

Elaine Arrington
Licensing Program Supervisor

(emphasis added for purposes of citation of this text at pg.9 of writ

(Text of 3/1/00 e-mail of Jensen/Wells. ER 132)

FWD:	Page 1
To: pljensen@ibm.net	
From: DonW41521@aol.com	
Date: Wed, 1 Mar 2000 00:31:23 EST	
Subject: Fwd:	

Here we go again !

In having Tom return to Sweet Home with some rules, we don't actually give away much. The rules would, I think, be pretty much what we asked for before. What is different is that Minerva has taken the hit and I am very concerned that when he comes back with his clip board, starts making notes, is rude to the staff and threatens to complain further to state officials, then Peg will be quickly evicted. Not a good thought.

Minerva suggests we move quickly, and I do not disagree. I spoke again with Atty. Pat Riley who indicates he is very willing to assist with a conservatorship of the person, and that may well be the correct course. Or, it may be that a restraining order is faster and less expensive. Of course, one possibility is that a RO is not an option – we're in rather a gray area with this and need advice.

Riley knows little about restraining orders, and says that we what we need is someone in "elder law". He has given me a couple of names he says are well known and very good. Are you willing to call them and do a quick phone assessment of which or both might be a good choice, as well as being available ? Beth and I could then arrange for some face time to see what options, costs, and best next steps might be.

Pricilla Camp	Greg Wilcox
Oakland	Berkeley
(510) 465-3885	(510) 665-8400

Operators are standing by. Tks. D & B (emphasis added for purposes of citation to this text at pg.9 of writ)

(Text of 3/5/00 communication from Jensen/Wells to Mostrales related to visitation restrictions. ER 132)

Minerva, here is the list of restrictions we considered. I understand you would like to add that Tom must be accompanied by another family member.

It is also my understanding that Elaine Arrington (a guess at spelling) would like to be consulted regarding these restrictions.

Don
03/05/00

Possible restrictions:

- 1 Hour/day, twice a week (once a week)
- Notify one week in advance of visit time. (Sweet Home reserves the right to ask time to be rescheduled to allow for suitable staffing.)
- Common room only – specifically NOT bedroom or bathroom
- May not take from house
- Obey posted visiting hours
- Courteous to all staff and patients. (Must in no way interfere with care providers or care of anyone).
- Failure to abide by any of above will result in police being called.

(emphasis added for purposes of citation of this text at pg.10 of writ).

(Text of 3/20/00 letter from DSS attorney Janet McKenzie to Jensen/Wells. ER 149)

03/20/00 09:40 916 654 1171
Mar-20-2000 09:50 DSS Legal Division 916 654 1171

State of California – Health and Human Services Agency
Gray Davis, Governor

DEPARTMENT OF SOCIAL SERVICES

March 20, 2000

Peter Jensen
5260 Edgeworth Rd.
San Diego, CA 92109

Via Facsimile: (619) 272-7225

Re: Sweet Home One

Dear Mr. Jensen,

I received your letter of March 19, 2000 which sets out your proposed "statement of restrictions" regarding your brother Tom. I am quite surprised at your implications in the letter that I "approved" locking your brother out of the home, or having licensing participate in presenting these restriction to Tom, etc. To the contrary, **I was quite clear in my conversation with you that, until you mother is conserved, her decisions about who she wants to visit her are the only ones we can enforce.** I refer you to Section 87572 of the California Code of Regulations, which sets out the personal rights of clients in a residential care facility for the elderly. These personal rights are possessed by your mother; if she decides that she wants to see your brother Tom, it would be a violation of her personal rights to prohibit it. **Community Care Licensing will not "approve" your proposed restrictions and will not "authorize" Sweet Home One to do anything that is contrary to your mother's personal rights. I in no way approved nor would I ever approve, community Care Licensing acting as the "presenter" of**

any such restrictions, even if they were legally enforceable (which these are not). That is quite beyond, if not contrary to, the role and responsibility of this Department.

Finally, I did say that Elaine Arrington and Anita Gopaul of the Community Care Licensing District Office are aware of your problematic situation and are willing to consider these factors in the exercise of their responsibilities. This is true especially in light of the fact that your family is seeking a conservatorship. When that occurs, you will be in a position to determine whatever restrictions you think are necessary for the health and well-being of your mother. if you have any questions, please call the Community Care Licensing Office at (650) 266-8800.

Sincerely,

Janet McKenzie

Staff Attorney

c.c. Elaine Arrington, SFDO

(emphasis added for purposes of citation of this text at pg.10 of writ)

(Text of pg. 3 of 4/33/00 Kaiser Hospital Transfer Summary. ER 50)

KAISER
PERMANENTE 900 Kelly Boulevard • Santa Clara • California 95051-5386

TRANSFER SUMMARY page 3 of 3

Name: Jensen, Marguerite MR # 0729 97 92

Date: 04/22/00 Attending Physician:

Philip Kim, MD

Determined to be unsafe to swallow and was kept NPO. In discussion with the family, a short-term Dobbhoff will be placed. A repeat swallowing evaluation is recommended in one week after the patient is recovering from her acute illness. Whether to continue long-term feeding tube, if the patient should prove to still be completely dysphagic would need to be discussed at that time. Long-term feeding tube is not a plan favored by durable power of attorney, her daughter. A Dobbhoff will be placed and Nutren feeds started.

Condition on Transfer:	Stable
Diet:	NPO, Nutren 50 cc/hr. per Dobbhoff
Activity:	Per physical therapy valuation
Followup:	With Dr. Jue upon discharge from skilled nursing facility.
Discharge Medications:	Ciprofloxacin 400 mg IV Q.12 h Flovent 110, 2 puffs bid. Aspirin 325 mg per Dobbhoff qd. Levothyroid 0.25 mg per Dobbhoff qd.

Transfer Diagnosis: 1) Pyelonephritis with right

staghorn calculus
2) Bacteremia with Klebsiela pneumonia
3) Dysphagia

Christa Litzenberger, MD

date signed: 5/3/00

Philip Kim, MD

date signed: 5/9/00

CL:dkr
cc: Clinic/Dr. Jue
D: 04/21/00
T: 04/21/00

(emphasis added for purposes of citation of this text at pg.12 of writ).

(Text of Exhibit D at 4 of Declaration of Mark Palley, attorney for Kaiser defendants. ER 51)

When should I see my doctor ?

You should see your doctor if you have any of these signs or symptoms:

- Burning feeling when you urinate
- Frequent or intense urges to urinate even when you have little urine to pass
- **Pain in you back or lower abdomen**
- **Cloudy, dark, bloody, or unusual-smelling urine** (emphasis added for purposes of citation to this text at pg.19 of writ)
- Fever or chills

Women are more likely to get UTIs than men are. When men get UTIs, however, they're often serious and hard to treat. **UTIs can be especially dangerous for older people** and pregnant women, as well as those with diabetes and those who have difficulty urinating.

(emphasis added for purposes of citation of this text at pg.12 of writ)

(Text of 3/6/00 Sweet Home letter. ER 51)

Sweet Home One Care Facility, 3019 Paine Ct., Fremont, CA. 94555

March 6, 2000

In August 1997 Phyllis Beth Wells, placed her parents Marguerite Jensen 89 y.o. and Gerald Jensen 92 y.o. in this facility. O (sic) the fact that they need care and supervisions with their food preparations, house keeping and their activities of daily living. As they were not capable of caring and living by themselves.

Upon Admission, Marguerite Jensen was already been diagnosed for several years with Chronic Asthma, Dimentia (sic) and incontinent bladder. For the first few months of her stay, she was adjusting and get confused from time to time where she is living. Time after time, she was re-oriented and reminded that she lives at Sweet Home, a board and care home where she is taking of (sic).

In spite of her short term memory, she finally was aware she was living here, specially when she can see all her familiar things in her bedroom. Although, due to her dementia, she always forgets, gets so confuse, sometimes upset, frustrated of not remembering and feeling lost. In worst situation, she does not listen to us until she can talk with Phyllis Beth Wells, her daughter or Don Wells her son-in-law in the phone, that usually alleviates and calm her feelings of insecurity.

At that time, her activities of daily living includes, giving her bath, supervise when to take her medications and inhalers **(she wants to keep her inhalers in her possession at all times, as with what she used to do and get upset for not allowing her to keep. As all medications are kept in locked medicine cabinet)** (emphasis added for purpose of citation to this text at pg.6 of writ). She knows and can get to the restroom or bathroom herself to do her bladder needs from time to time even she is incontinenet (sic). Also she knows when to do her bowel needs. She can wipe and clean

up herself and just supervise and assist with her diaper change. She washes her hands after each bathroom use without reminding her. She can do her oral hygiene, brushing her teeth and denture herself with just supervision. She can dress herself, put on her shoes, comb her hair with minimal to moderate assistance and supervisions.

About her mental status, she was able to remember some of her past memories, specially when she was a teacher. Sh can carry on some sensible stories and conversations. **This last year, her mental and physical status grdually (sic) decline. As she more forgetful, more anxious, more confuse, anxious and get tired easily when often brought out for a walk** (emphasis added for purposes of citation to this text at pg.3 of writ). It usually takes a day or two for her to recover from being tired and exhausted.

Gradually her needs of care, supervision and assistance with activities of daily living increases. She is not capable of doing her personal hygiene like needs total care in brushing and cleaning her teeth and dentures. She needs total assistance in dressing, putting her shoes, combing her hair and grooming her. **Recently this last few weeks, she didn't know when to go to the bathroom herself for her bladder and bowel needs, unless guided to the bathroom, assisted and supervise what to do** (emphasis added for purposes of citation of this text at pgs.12, 29 of writ). She needs a lot of help and assistance in cleaning and wiping and cleaning up after each us, as she cannot do it by herself at this time. She needs to be reminded to wash her hands after each bathroom use. Her level of care at this time is high, as her mental and physical status and capabilities as (sic) decline. She needs total guidance and supervision as she is not capable of doing proper jugement (sic) of caring herself and cannot make right and best decisions at this time of her life.

If you have any questions or inquiries, do not hesitate to call me at (510) 333-5659.

Minerva Mostrales - Administrator - S.H. 1 Care Facility

(Text from pgs. 8-10 of transcript of 5/17/02 Case Management Conference. ER 4)

Mr. Jensen: But I, that is basically the issue I think between me and the defendants, and I think basically they are claiming that they want to use reasonableness as the legal issue, and that requires looking at all the facts and it's what the parties did, what they failed to do. And its all relevant to the establishment of the claims.

One of the things I did plead specifically in Claim One was retaliation. That is in Claim One. And for retaliation, you have to establish if there was reason to retaliate, and the reason to retaliate was because of my mother. If you leave that out, it becomes sort of nonsensical.

The other issue that I prepared for today was that basically **I made a claim of First Amendment retaliation because I made a report of neglect and there was retaliation against me. And if the allegations of retaliation are left out, then it makes no sense at all. That's the whole basis of the claim. That's why I was there, and that's why everything happened because I reported elder abuse.**

And that – I have other comments on that, too, but that is the basic issue. There is no way I can or anybody can establish reasonableness if that particular fact is left out.

Ms. Martin: I represent the Sweet Home defendants. I think our concern is not – and I appreciate what Mr. Jensen is saying, but the only claim that's left in this case as far as I read the Ninth Circuit opinion is the issue of the extent to which Mr. Jensen personally was injured by visitation restrictions.

What we have is a hundred allegation complaint that has a lot of **stuff in there about details regarding his mother's condition as he saw it, or as he alleges, details regarding the elderly, generally as a class.**

Those are not relevant to the visitation restrictions, at

least as far as stating a claim in his complaint.

What I am concerned about is that the complaint not only is going to require a line-by-line answer, which albeit require a lot of denial, but **I am concerned about the extent to which the pleading does operate in this case is going to frame the issues for discovery purposes and how that's going to play out later in the case.**

So that's why we propose, we thought it would be the easiest on the court, that would be the clearest, not require a lot of briefing, so on and so forth, to have the parties submit redacted complaint (sic) for the court to review independently and we just thought that would be the most expeditious and easiest way to proceed.

The Court: You agree with that ?

Ms. Flaherty: Yes, I do, your Honor.

The Court: Let's do this.

As Mr. Jensen points out, we can't really do anything today until we get the mandate back.

(emphasis added for purposes of citation of this text at pg.14 of writ)

(Text of pgs.2-3 of Kaiser's **July 28, 2004** interrogatory responses. Doc # 345, Ex. A at 35-36)

right to privacy, or any other claim of privilege, including the physician-patient privilege or confidentiality of trade secrets, the Kaiser defendants assert that right, privilege, or immunity and object to the interrogatory on that basis.

B. **The Kaiser defendants have not completed discovery yet, and therefore reserve the right to amend their answers and to rely at trial upon later discovered information.**

Subject to and without waiving these objections, the Kaiser defendants respond to the special interrogatories as follows.:

II. RESPONSES TO INTERROGATORIES

INTERROGATORY NO. 1:

State in full specific detail the subjects of the information for the individuals you have identified in your initial disclosures as having information likely to support your defenses, but did not provide as required by FRCP 26(a)(A) (your initial disclosures attached).

RESPONSE TO INTERROGATORY NO. 1:

The Kaiser defendants object to this interrogatory on the ground that it is unduly burdensome and oppressive, and is compound. **Without waiving the foregoing objection, the Kaiser defendants answer: Bill Jue M.D., Minerva Mostrales, and Michael Benson have information concerning if Kaiser barred plaintiff from its facilities and if Kaiser defendants conspired with defendant Sweet Home to bar plaintiff from Sweet Home's facility.**

INTRERROGATORY NO. 2:

Describe in full and specific detail all *information* Bill Jue MD may use to support your defenses.

RESPONSE TO INTERROGATORY NO. 2:

The Kaiser defendants object to this request on the grounds that it is unduly burdensome and oppressive and compound. The Kaiser defendants further object that they are not the proper parties to respond to this interrogatory.

(emphasis added for purposes of citation of this text at pg.17 of writ)

(Text of Kaiser defendants' 4/12/04 letter. Doc # 308)

Marion's Inn

Latham Square
1611 Telegraph Ave, Suite 707
Oakland California 94612-2145

Kennedy P. Richardson
Mark Palley
Yvonne M. Pierrou
Cindy S. Yau
Eugene Chang

Telephone
(510) 451-6770

Facsimile
(510)451-1711

April 12, 2004

Hon. Vaughn R. Walker
U.S. District Court
Northern District of California
450 Golden Gate Avenue
San Francisco, CA 94102

VIA FEDERAL EXPRESS

Re: Jensen v. Sweet Home Care
U.S.D.C. No. C 00-03261

Hon. Judge Walker:

On March 26, 2004, plaintiff filed a motion against Kaiser Foundation Health Plan, Inc., Kaiser foundation Hospitals, The Permanente Medical Group, Inc., and Bill Jue, M.D. ("Kaiser defendants") concerning their Rule 26(A) disclosures. The motion is set for hearing on June 3, 2004.

This motion is in essence a discovery motion. The October 2 CMC order specifically provides that "The court will not entertain formal motions to compel discovery without prior leave of court. Discovery disputes should be brought to the court's attention by: (1) telephone conference with the court and all parties scheduled by the court, or (2) letter not exceeding two pages, with copies served on all parties, and advising the court that a dispute exists and its

nature."

The court therefore should not entertain Mr. Jensen's motion because he has not obtained the court's permission before filing this motion. The Kaiser defendants are ready to oppose the motion on its merit, unless otherwise directed by the court. Please direct your staff to advise me before May 3, 2004, ten days before the due date for Kaiser's opposition on May 13, if an opposition is required. Thank you very much.

Very Truly yours,

Cindy S. Yau

CSY: mb
Cc: Tom Jensen
Sonia Martin
Susan King

(this text cited at pg.17 of writ).

(Text of Petitioner's Standing Order 2 letter asking for relief from discovery dispute with Kaiser defendants, filed 8/2/04. ER 64-65)

Tom Jensen, plaintiff in pro per
General Delivery
Oakland, CA 94617

Re: Jensen v. Sweet Home, C-00-3261 VRW – Standing Order 2 letter regarding discovery dispute

Honorable Vaughn R. Walker
Courtroom 6, 17th Floor
450 Golden Gate Ave.
San Francisco, CA

Dear Judge Walker Aug. 2, 2004

(1) Introduction: Kaiser defendants ("Kaiser") produced only plaintiff's mother's medical records in response to plaintiff's first document requests, claimed blanket claims of privileges and protections, and did not provide a privilege log. Kaiser delayed its initial disclosures and its answer. After extensive meet and confer on these issues, diverting plaintiff's time and energies from discovery and preparation for trial, Kaiser produced only one additional document that was also included in Kaiser's initial disclosures as supporting its defenses, did not provide the subjects of the information or names and addresses of its individuals likely to have information supporting its defenses, and refused to produce a privilege log. Kaiser also evaded answering many factual allegations, and failed to admit facts in their possession in its answer.

Plaintiff served his 2nd, 3rd, and 4th document requests and interrogatories to Kaiser in June. Plaintiff's requests were designed to be comprehensive because Kaiser had admitted it had "not completed its discovery yet," and Kaiser's Answer and responses to plaintiff's 1st document request indicated Kaiser had not done a reasonable inquiry. Kaiser produced

no documents and almost no information in its interrogatory responses. Instead virtually all of Kaiser's responses claimed blanket attorney-client ("A-c") privileges and work product ("WP") protections, as well as other blanket objections, without producing a privilege log for responsive documents.

Plaintiff sent multiple meet and confer letter to Kaiser defendants in a good faith attempt to settle the disputed issues. **Kaiser responded with only one conclusory letter failing to address the issues plaintiff raised concerning** (1) Kaiser's failure explain how their objections related to the documents or information requested, (2) **Kaiser's claim of lack of relevance for information plaintiff requested related to the neglect of plaintiff's mother's personal and health care and plaintiff's advocacy for its correction alleged in the SAC**, and (3) Kaiser's failure to produce a privilege log for the third time, and plaintiff's demands that Kaiser waive its claimed privileges and protections and produc the information plaintiff requested on that account.

(2) Facts: Claim II alleges that "on the basis of erroneous assumptions and inappropriate reaction" to perceptions that plaintiff had a mental disability "Sweet Home and Kaiser defendants agreed to not give credit to plaintiff's reports or evidence of neglect of his mother's personal and health care, agreed to false allegations he was disruptive and agreed to deny him access to Sweet Home and Kaiser defendant services for his mother." SAC ¶104. The complaint alleged alleges and the evidence shows, that Kaiser denied plaintiff access to medical care services for his mother by refusing to treat his mother, for her medical conditions Plaintiff reported to them, because of erroneous assumptions and inappropriate reactions to plaintiff and his reports and advocacy because they perceived him to be mentally disabled. Evidence shows that these erroneous assumptions and inappropriate reactions included Bill Jue MD's failure to give due credit to plaintiff's reports of the signs and symptoms of his mother's medical conditions (Mostrales'

statements in SAC Ex.C, and plaintiff's mother's medical records showing, inter alia, Jue refuse to treat plaintiff's mother's urinary tract infection ("UTI"), even though plaintiff had reported his mother's signs and symptoms of UTI, and advocated for its treatment in a letter alleged in the complaint. SAC ¶¶ 24 & 31), and Bill Jue MD's statement that he "was concerned about his persistent behavior (plaintiffs' letters to Jue reporting his mother's signs and symptoms of illness and advocating for its treatment). And feel somewhat uneasy and threatened" indicating that he erroneously and inappropriately perceived plaintiff as threatening. Kaiser's Initial Disclosures.

Consistent with these allegations and evidence, Plaintiff's interrogatories and documents requests generally sought information showing (1) plaintiff's mother needed the medical care plaintiff sought and advocated for, (2) Jue and Kaiser entities refused to provide it, and (3) Jue and Kaiser entities reason's for their refusal to treat plaintiff's mother were based on erroneous assumptions and inappropriate reactions to plaintiff's reports of neglect of his mother's health care and advocacy for its correction because he was perceived to be mentally disabled. As an example of plaintiff's requests for information along these lines of inquiry, Plaintiff's 2nd set of Doc.Req.No.'s 1-7 asked for documents related to Jue's communications with Mosrales and Beth Wells, and Mostrales' Statement in SAC, Ex.C about Jue's reactions to plaintiff and his reports. Introg. No.'s 21-24 asked Jue for information under the heading of "Your Communications With Person's or Entities Related to you Medical Decisions,"Introg.No.25 asked Jue if anyone influenced his decision not to provide medical treatment for his mother. Kaiser responded to these requests with blanket claims of privileges and objections (sic). Kaiser also claimed it had no documents for several of these requests indicating its possession of responsive documents for the others.

Along these lines of inquiry, plaintiff also requested

documents sand information from the following additional categories (in quotes) of requests: Bill Jue's Statements" ("I am concerned about his persistent behavior and feel somewhat uneasy and threatened"). "Medical Records" related to plaintiff's mother's medical conditions, the "Subjects of the information" Kaiser had not included in their initial disclosures, plaintiff's contacts with Kaiser "Patient Representative and Member Services," Kaiser's "Communications with Public Entities," communications with "Legal Services/Legal Division," "Documents in Kaiser Files Related to Marguerite Jensen and Tom Jensen, "Documents Related to Kaiser Policies and Medical Standards," "documents Related to the Times Minerva Mostrales was at Kaiser Premises" (to establish Mostrales' lack of personal knowledge of plaintiff's activities at Sweet Home).

Kaiser provided no documents, claimed blanket privileges and protections for all requests, with only a few exceptions, and produced no privilege log. Kaiser entities' brief and few interrogatory answers were not signed by a Kaiser entity representative, only by Kaiser counsel Cindy Yau. All defendants refused to stipulate to low cost Rule 29 depositions procedures.

(3) Argument and conclusion: Kaiser's discovery conduct has consistently prejudiced plaintiff by diverting his time and energy from discovery and preparation for trial. Kaiser defendants have failed to discharge their meet and confer obligations to respond on the issue of dispute plaintiff presented to them. Kaiser has waived any privileges or protection they might otherwise claim by three times failing to provide a privilege log required by established case law and the Case Management Order. Kaiser counsel violated California Rules of Professional Conduct by signing Kaiser entities' interrogatory answers. By putting at issue the facts to which she has attested, she has waived any A-C privileges or WP protections for documents related to her answers.

Because Kaiser has produced virtually none of the information plaintiff has requested, plaintiff has no other source of information but the attorney-client communications and work product of Kaiser and its attorneys. Even if plaintiff could take low-cost depositions, the effort would be futile because Kaiser defendants would merely repeat their objections and thwart plaintiff's deposition questions. The court should ot allow Kaiser's conduct to be an example of permissible litigation strategy or allow Kaiser to continue to obstruct plaintiff's discovery.

(4) Request for Relief: Plaintiff requests the court order Kaiser (1) to respond to all plaintiff's requests for information and documents related to neglect of his mother's personal and health care and his advocacy for its correction, and (2) Order Kaiser to waive all privileges and protections and produce all responsive documents, including all Kaiser's attorney-client communications and all Kaiser's and Kaiser counsel's work product documents.

Tom Jensen

(emphasis added for purposes of citation of this text at pg.18 of writ)

(Text of Petitioner's Standing Order 2 letter asking for relief from discovery dispute with State defendants, filed 8/2/04. ER 175-76)

Tom Jensen, plaintiff in pro per
General Delivery
Oakland, CA 94617

Re: Jensen v. Sweet Home, C-00-3261 VRW – Standing Order 2 letter regarding discovery dispute

Honorable Vaughn R. Walker
Courtroom 6, 17th Floor
450 Golden Gate Ave.
San Francisco, CA

Dear Judge Walker, Aug. 2, 2004

(1) Introduction: After receiving State defendant's ("SD's") responses to plaintiff's 2nd set of document requests served in June, plaintiff initiated meet and confer with SD with a series of letters in a good faith effort to settle the disputed issues of (1) SD's objections of lack of relevancy for plaintiff's requests for documents related to the neglect of his mother's personal and health care and his advocacy for its correction alleged in the SAC, (2) SD's claims of attorney-client ("A-C") privileges and work product ("WP") protections for attorney Janet McKenzie's documents, and (3) demanding that SD waive its claimed A-C privileges and WP protections for Janet McKenzie's documents for, inter alia, its failure for the third time to produce a privilege log for them. SD responded belatedly with a single letter making the following statements related to relevancy, and A-C privileges respectively: **"any discovery requests that deal with alleged negligence by Sweet Home or the medical care your mother received from Kaiser have no bearing in the issues in this lawsuit."** "As to those documents for which the State defendants claimed a privilege, we have already provided you with a privilege log except for those

documents protected by the attorney-client privilege. The attorney-client privilege is an absolute privilege. As you know, the documents were produced (sic) by Janet McKenzie, staff counsel for the Department of Social Services. Therefore, the State defendants do not to provide any additional information regarding those documents.

(2) Facts: In response to the Court's July 29 Order (pgs.19-20, SD produce a privilege log and additional documents. For A-C privileges, SD's privilege log read as follows: (1) "AGO 001-007, 10-13-00, Letter from J.Haines to A. Gopaul, Attorney Client," (2) "0800, 2-06-01 letter from Humes to A. Gopaul, Attorney-Client," (3) **"593, 3-16-00 "Telephone call Gopaul and McKenzie, Attorney-Client"** (emphasis added for purposes of citation to this text at pgs.8 n.8, 10 of writ). (4) These entries in SD's privilege log failed to include the information mandated by the Case Management Order of steps taken to ensure the confidentiality of the communication, including affirmation that no unauthorized persons received the communications," and the "subject matter of the communication." No WP documents were listed.

After lengthy meet and confer, diverting plaintiff's time and energies from discovery and preparation for trial, **SD admitted that it had withheld documents from the files of attorney Janet McKenzie, who approved the visitation restrictions, that it had not included in its privilege log** (emphasis added for purposes of citation of this text at pg.8 of writ). In a letter dated October 6, 2003, SD's attorney Susan king stated "any noted [Janet McKenzie] made, with the exception of the letter to Peter Jensen, referred to legal advice she was providing to her clients and is privileged under Federal Rules of Evidence 501." These "notes," however, can only be considered to be WP protected. SD did not produce a privilege log for these "notes."

In his 2nd set document requests, plaintiff requested the following documents under the general heading "Approval of

the Visitation Restrictions."

"Document Request No.12: All your documents related to Janet McKenzie's approval of the visitation restrictions for Tom Jensen, including but not limited to Janet McKenzie's consultation memorandum, or any equivalent or similar document, and Janet McKenzie's notes related to her approval of the restrictions."

Document Request No.31: All your documents on which attorney Janet McKenzie based her approval of the visitation restrictions for Tom Jensen, including but not limited to documents referred to in her notes."

Document Request No.18: a copy of all your documents, faxed or sent from Janet McKenzie to any person or entity, related to Tom Jensen, the visitation restrictions or any other relevant matter."

SD Claimed A-C privileges and WP protections as well as other blanket objections for the foregoing document requests without producing a privilege log (emphasis added for purposes of citation of this text at pg.8 of writ). These categories of documents go beyond the Janet McKenzie's "notes" categories SD previously acknowledged existed.

The SAC alleges that "The Visitation Restrictions for Tom Jensen were issued and imposed, and the State defendants [investigation] were deliberately delayed, without notice to the plaintiff, without a haring, without valid legal authority, without a right of appeal, without just cause, and in retaliation for plaintiff's reports of the neglect of his mother's care and his advocacy for its correction ... State defendants were acting outside the scope of their state statutory authority to issue and impose visitation restrictions and delay their investigation ..." SAC ¶¶89 & 94. Additionally, plaintiff has alleged that state defendants have discriminated against plaintiff on the basis of disability "by using allegations that he had a mental disability and the symptoms and exigencies of his chronic illness as evidence he caused "disruption" and

was not credible, by agreeing with false allegations against him ..., and by agreeing to threaten him with police action ..." SAC ¶¶89 & 94. Additionally, plaintiff has alleged that state defendants have discriminated against plaintiff on the basis of disability "by using the allegations that he had a mental disability and the symptoms and exigencies of his chronic illness as evidence that he caused "disruption" and was not credible, by agreeing with false allegations against him ..., and by agreeing to threaten him with police action ..." SAC "104.

SD pleaded on their defense that they acted "Pursuant to the laws, regulation, rules and practices reasonably believed to be in accordance with the constitution and laws of the United States and the State of California." Janet McKenzie is a person having information supporting the claims or defense of the parties in this action.

(3) Argument and conclusion: SD never produced a privilege log for Janet McKenzie's notes or the documents plaintiff requested in his 2nd set of documents for which it now claims privileges and protections, in violation of the July 29, 2003 Order and the Case management Order requiring it to do so. Under the terms of the Case Management Order, SD has waived A-C privileges and WP protections for the documents plaintiff has requested in document requests 12, 13, and 18.

The allegations and evidence alleged in the SAC, SD's defenses, and the evidence produced through discovery, put the factual and legal basis of Janet McKenzie's decision to approve the visitation restrictions at issue. (emphasis added for purposes of citation of this text at pg.8 of writ)

Additionally, Janet McKenzie status as a person having information supporting SD's defenses, puts her in the position of being able to selectively use her information as a sword, and her privileges and protections as a shield preventing plaintiff's access to information supporting his

claims, waiving any A-C privileges and WP protections for that information. *Chevron Corp. v. Pennziol Co.*, 974 F.2d 1156, 1162 (9th Cir. 1992).

The elements of Plaintiff's claims against SD are (1) plaintiff's mother's needed relief from the neglect of her personal and health care plaintiff reported to SD, (2) SD failed to provide relief from her neglect, and instead approved and ratified retaliation against plaintiff for reporting it and advocating for its correction, (3) SD did these things pursuant to, discriminatory state custom and policy favoring long-term care facilities, reckless conduct deliberately indifferent to plaintiff's constitutional and statutory rights, including grossly negligent investigation and discrimination on the basis of disability, and without procedural due process or valid legal authority, i.e. ultra vires. **Information related to neglect of plaintiff's mother's personal and health care, is highly relevant and material because a showing of proof of neglect is an essential element of the proof of plaintiff's claims and opposition to all defendants' defenses.**

(4) Request for relief: Plaintiff requests the court order State defendants to (1) **respond to all plaintiff's requests for information and documents related to neglect of his mother's personal and health care and advocacy for its correction.** (2) **Waive attorney-client privileges and work product protections for the information plaintiff has requested in his 2nd set of document requests No.'s 12,13,and 18, and produce the documents requested** (emphasis added for purposes of citation of this text at pg.8 of writ).

Tom Jensen

(emphasis added for purposes of citation of this text at pg.18 of writ)

(2)

No. 06-546

Supreme Court, U.S.
FILED
FEB - 2 2007
OFFICE OF THE CLERK

In the
SUPREME COURT OF THE UNITED STATES

TOM JENSEN, Individually and as an advocate
for the rights and interests of his mother, Marguerite Jensen (now deceased), a frail elderly institutionalized person,

Petitioner

v.

SWEET HOME ONE CARE FACILITY
A business entity, et al.

On Petition for Rehearing of Denial of Writ of Certiorari
To the United States Court of Appeals
For the Ninth Circuit

PETITION FOR REHEARING OF DENIAL OF WRIT OF CERTIORARI

Tom Jensen
P.O. Box 614
Oakland, CA. 94604

Petitioner in propria persona

RECEIVED
FEB 8 - 2007
OFFICE OF THE CLERK
SUPREME COURT, U.S.

QUESTIONS PRESENTED

I. Was Petitioner denied his due process right to a hearing on his claims before an impartial tribunal by the district judge ?

II. Do the proceedings in this case lack the appearance of fairness ?

III. Does this court have the jurisdiction or discretion and duty to hear the foregoing matters ?

PARTIES TO THE PROCEEDINGS BELOW

Petitioner/Plaintiff

Tom Jensen.

Defendants

Sweet Home One Care Facility, a business entity; Minerva Mostrales, Soledad Almocera ("Sweet Home defendants").

California Health and Welfare Agency (currently known as the California Health and Human Services Agency), California Department of Social Services, Community Care Licensing Div., public entities; Elaine Arrington, Anita Gopaul, Martha Lopez ("State defendants").

Kaiser Permanente Medical Offices – Milpitas (a.k.a. Kaiser Permanente Medical Group, Inc., Kaiser Foundation Health Plan, Kaiser Foundation Hospitals) business entities; Bill Jue MD ("Kaiser defendants").

Peter Jensen, Beth Wells ("Jensen/Wells").

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2. The judge improperly and undeservedly threatened petitioner with sanctions in his order responding to petitioner's motion requesting reconsideration of the judge's failure to consider the material pleaded facts, evidence, and inferences alleged in the complaint regarding the motive and intent of Jensen/Wells 6

3. The judge effectively, and improperly and undeservedly carried out his sanction threat shortly after issuing its threatening order, by his improper

ad hoc "termination" of Petitioner's motions for relief from Kaiser defendants' abusive litigation tactics, and by improperly ignoring Petitioner's subsequent requests for discovery relief pursuant to its Standing Order 2 7

4. Petitioner's letter-motion filed in response to the judge's termination of Petitioner's motions and for the judge's failure to respond to his Standing Order 2 letters seeking discovery relief was effectively a motion for recusal for the judge's lack of impartiality, to which the judge should have but did not respond either by recusing himself sua sponte or by hearing the motion 8

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PETITION FOR REHEARING OF DENIAL OF WRIT OF CERTIORARI

Tom Jensen, for himself and as an advocate for the rights and interests of his mother Marguerite Jensen, a frail elderly institutionalized person (now deceased), respectfully petitions for a rehearing of the denial of his petition for writ of certiorari to review the judgment of the U.S. Court of Appeals for the Ninth Circuit.

OPINIONS BELOW

The May 18, 2006 decision of the U.S. Court of Appeals is reproduced at App.1 of petitioner's Petition for Writ of Certiorari. The January 31, 2005 decision of the U.S. District Court for the Northern District of California granting defendants' summary judgment motions is reproduced at App.7 of the Writ.

JURISDICTION

This Court has jurisdiction for rehearing a petition for writ of certiorari pursuant to Supreme Court Rule 44.

RELEVANT CONSTITUTIONAL, STATUTORY, AND REGULATORY PROVISIONS

The relevant constitutional, statutory, and regulatory provisions are reproduced in the Appendix at App.v

STATEMENT OF THE CASE

Statement of the Facts Material to Consideration of the Questions Presented

1. In petitioner's proposed 3rd amended complaint against Jensen/Wells he alleged, inter alia, that "state defendants acceded to fraudulent, defamatory, pretextual, and retaliatory allegations against Plaintiff which were made to them by Sweet Home and Family defendants, (Jensen/Wells) and which were meant to discredit and defame him and to discredit his reports of the neglect of his mother." App.1. In their 7/10/03 motion to deny of leave to amend,

Jensen/Wells asserted that "[t]he gist of Plaintiff's allegations against the Family defendants is their purported communications with the other defendants regarding their concerns as to Plaintiff's conduct that they believed to be detrimental" to petitioner's mother. App.2. The Judge in his 7/31/03 order denying leave to amend stated, inter alia, that "the attached exhibits, if taken as true, acknowledges that [Jensen/Wells] merely expressed their views to state officials in the hopes that they would agree." App.3.

2. On 9/23/03 Petitioner filed a motion for reconsideration of the court's order denying leave to amend stating, inter alia, that the judge had "wholly ignored the factual allegation of the complaint that alleged facts and evidence of [Jensen/Wells'] improper motives of retaliation and discrimination on the basis of disability and plaintiff's arguments setting out these things." App.4-5. In its 1/5/04 order denying reconsideration, the court threatened Petitioner with sanctions for raising the issue and the lack of impartiality it implied. App.6-7. App.5, note 6.

3. On 3/9/04, and after extensive meet and confer with Kaiser defendants, petitioner filed a motion to strike Kaiser defendants answer for, inter alia, failure to do a reasonable inquiry before answering and failing to admit facts in their possession, App.8-9 (excerpts from motion), and on 3/26/04, a motion for discovery sanctions for, inter alia, Kaiser's persistent violations of the discovery rules and the court's case management order, inter alia, App.10-12. On 4/12/04 Kaiser defendants sent a letter to the judge claiming that petitioner's motion for sanctions was "in essence a discovery motion," and stating that "Kaiser defendants are ready to oppose the motion on its merit, unless otherwise directed by the court." App.13-14. On [ ] the judge "terminated" petitioner's two pending motions without full briefing or a hearing on the merits of the motions, and without notice or hearing to petitioner regarding the judge's decision to "terminate" them. App.15-16.

4. After the judge had failed to respond to petitioner's Standing Order 2 letters for discovery relief prescribed by the judge's 4/27 Order, petitioner filed a letter-motion on 9/19/04 moving for a stay for reason that the judge had exhibited a lack of impartiality, and had violated petitioner's due process and procedural rights during the course of the proceedings and had prejudiced him and left him unprepared for summary judgment in spite of his diligent efforts in pursuit of discovery. App.17-18. The court did not respond to this letter-motion.

5. In its summary judgment order the judge stated as an undisputed fact in support of its disposition that the visitation restrictions were based in part on Jensen/Wells "genuine concern" for Petitioner's mother. App.19 (Order at 33). While ignoring petitioner's pleadings and direct evidence and the justifiable inferences supporting them that their concern was *not* genuine,). e.g. App.21-22 (e-mail of Jensen/Wells'), on the basis that it was purported hearsay, App.20 (Order at 34, the judge in contrast, cited defendants' hearsay concerning petitioner's purported conduct and treated it as true in support of its disposition. App.20 (order). App.23 (Mostrales' letter). App.20 (order). The judge also wholly failed to consider any of petitioner's pleaded facts of the neglect of his mother's personal and health care, App.24-28 (SAC ¶¶ 14-22 and declaration ¶ 8 verifying the facts), or any of the evidence supporting them as evidence showing that Jensen/Wells "genuine concern" and Mostrales' hearsay allegations of petitioner's "behavioral problems" were pretexts for retaliation or discrimination.

6. In the first paragraph of his summary judgment order, the judge made a comment involving the length of the proceedings and the volume of the filings. App.29. The "intermediate appeal" was based on the failure of the first judge's failure to treat the factual allegations of the complaint as true and draw all reasonable inferences in petitioners favor which the defendants improperly influenced her to make. App.30 (Order). App.31 (petitioner's motion before

dismissal). After remand the defendants proposed to strike ("redact"), inter alia, petitioner's verified allegations of the neglect of his mother's personal and health care without briefing. App.32. After reassignment, all the defendants failed to properly respond to petitioner's requests for documents and information and engaged in persistent violations of the federal rules and continued misrepresenting petitioner's pleadings in their motions. This conduct required petitioner to respond and distracted him from preparation for trial.

In the last paragraph of his order the judge stated his opinion that the "heart" of the lawsuit was petitioner's despondency over the state of the relationship with his family, and that his motivation for bringing the suit was "vengeance." App.33-34. The judge's opinion is not consistent with petitioner's declaration verifying the neglect of his mother's personal and health care he alleged, nor is it consistent with his declaration verifying his concern for and sense of duty to his mother. App.35 (declaration at ¶14)

7. Petitioner raised the issue of the unfair conduct of the proceedings in the court of appeals in his proposed oversize brief, and in a request for judicial notice, App.36 (excerpt from brief and req. for jud. not.), and mentioned the prejudice accruing to him in his appellant's brief, App.37 (excerpt from brief), when leave to file the proposed oversized brief was denied.

ARGUMENT

Legal Standards: Due process requires an impartial decision maker. *Aetna Life Insurance Co. v. Lavoie*, 475 U.S. 813 (1986). *In Re Murchison*, 349 U.S. 133, 136 (1954). federal law and judicial canons of ethics require that federal court proceedings have the appearance of fairness and that the judge "be faithful to the law." 28 USC § 455(a). Canons 2(A) and 3(B)(2). App.pg.1. Judicial "expressions" during a proceeding may well be based on extrajudicial knowledge or motives, and evidence of lack of impartiality may arise from the

proceedings themselves by "*wrongful*" or "*inappropriate*" comments or opinions and dispositions of a judge during the course of the proceedings that were undeserved. Opinions formed by a judge during a proceeding that evidence "deep-seated favoritism or antagonism that would make fair judgment impossible" are grounds for disqualification or reversal. *Litekey v. United States*, 510 U.S. 540, 545, 550-52, 555 (1994) (emphasis in original). Section 455 (a) and (b)(1) imposes on a judge the duty to recuse himself sua sponte whenever "his impartiality might reasonably be questioned," or when he has a personal bias or prejudice concerning a party.

Summary of Argument: Lack of impartiality by the judge in this case is evidenced by the Judge's dispositions and judicial expressions about petitioner during the course of the proceedings that were wrongful and inappropriate because they were undeserved and demonstrated a lack of impartiality and failure to be faithful to the law pursuant to a predisposition favoring opposing parties. This court has the jurisdiction and discretion to hear the issue of the district court judge's lack of impartiality, because petitioner raised the issue in the district court before the judge's summary judgment decision and the judge failed to respond to it, and raised the issue in the court of appeals and that court failed to respond to it. This court also has the inherent and supervisory powers and duty to review the issue sua sponte.

1. The district court judge's comments in its order dismissing petitioner's claims against Jensen/Wells shows that he failed to properly consider petitioner's pleadings, and demonstrated his partiality to opposing parties' version of the facts expressed in their motions, and a closed mind to the pleadings. See citations to Appendix at Statement of Facts Material to the Questions Presented ("Facts") at 1 supra.

Jensen/Wells' motion misrepresented the pleadings, and the judge's comments in its order indicated that he had adopted those misrepresentations, and petitioner's factual allegations of his complaint that alleged and provided direct and circumstantial evidence of the improper motives of Jensen/Wells and other defendants of retaliation and disability discrimination in the

form of detailed factual allegations of the neglect of his mother's personal and health care, the close proximity of time between Petitioner's reports of that neglect and the adverse actions taken against him by Jensen/Wells, and statements by Jensen/Wells and other defendants that Petitioner was "mentally unstable" and "mentally ill." No reasonable judge could have possibly or properly treated Jensen/Wells' misrepresentation of the pleadings as true, nor considered Jensen/Wells' motives as pure if Petitioner's allegations of the neglect of his mother's personal and health were properly treated as true.

The circumstances show that the judge failed to be faithful to the law requiring him to consider the issues raised by the pleadings and treat the pleadings as true and draw all reasonable inferences in the pleader's favor. The judge's failure to be faithful to the law properly would cause any reasonable person with a knowledge of all the facts and circumstances to have reasonable cause to question the judge's impartiality. 28 USC § 455(a). Moreover, the judge's disposition was a wrongful and inappropriate "backdoor" judgment on petitioner's essential pleaded issue of retaliatory motive and intent that was undeserved. *Liteky*, supra at 550.

2. The judge improperly and undeservedly threatened petitioner with sanctions shortly in his order responding to petitioner's motion requesting reconsideration of the judge's failure to consider the pleaded facts, evidence, and proper inferences of Jensen/Wells' improper motive and intent. See Facts at 2 supra.

The judge's order denying Petitioner's motion for reconsideration wholly ignored Petitioner's specific request that the court reconsider its failure to consider Petitioner's factual allegations and the evidence supporting them that Jensen/Wells and the other defendants acted with retaliatory or discriminatory motive and intent. It was unreasonable for the judge to fail to reconsider the matter, and if he had, he would have had to admit that these facts were the elements of joint action that he considered to be missing. Instead of stating that "plaintiff's siblings merely expressed their views to state officials, in the hopes that they would agree," the

judge would have had to state that "plaintiff's siblings expressed their retaliatory and discriminatory allegations against plaintiff to state defendants, and state defendants corruptly agreed with them."

The judge's threat of sanctions was wrongful and inappropriate because it improperly threatened Petitioner for expressing his procedural and due process rights. The judge's threat of sanctions would cause any litigant to become "overawed, frightened and confused" by the judge's failure to follow the law and making intimidating threats when his failure to do so was pointed out. *Gardiner v. A.H. Robbins Co., Inc.*, 747 F.2d 1180, 1193 (8th Cir. 1984).

3. The judge effectively, and improperly and undeservedly carried out his sanction threat shortly after issuing his threatening order, by his improper ad hoc "termination" of petitioner's motions for relief from Kaiser defendants' abusive litigation tactics, and by improperly ignoring Petitioner's subsequent requests for discovery relief pursuant to his order. See Facts at 3 supra.

Under the federal rules and due process principles, petitioner was entitled but did not receive a hearing on the merits of his motions, nor was he given an opportunity to be heard on the merits of his Standing Order 2 letters for discovery relief. Moreover, his due process rights to notice and a hearing before the termination of his motions, and denial of his right to be heard on his request for discovery relief were violated. *Gardiner* supra at 1190-92 (due process required before depriving litigant of constitutional, or procedural right). *Id.* at 1193 (due process required before imposing sanctions).

Moreover, there is no evidence that the motions and letters requesting discovery relief were not justified, instead there is ample evidence that they were, and the judge decided the issue of the termination of his motions on the basis of a conclusionary misrepresentation of petioner's motions and the circumstances giving rise to it by Kaiser defendants. The judge by terminating Petitioner's motions, and failing to respond to Petitioner's letters requesting discovery relief

effectively ratified the Kaiser defendants' improper conduct and effectively served notice to Kaiser and to the other defendants that they could do so as well. Petitioner was thereby denied his rights to discovery of relevant and unprivileged information, denied his procedural and due process rights, and deprived of the judge's reasons for the denials for purposes of appeal and review. *Gardiner* at 1193.

By his dispositions, the judge demonstrated that he would hear only the evidence that Kaiser defendants were willing to provide as part of their defense in their motion for summary judgment, regardless of petitioner's rights to discovery of relevant evidence to prove his claims, and petitioner's right to have the court receive and consider it, as well as the court's duty to do so. FRCP 1. Canons 2(A), 3B(2) and 3B(7). *Goldberger v. Goldberger*, 624 A.2d 1328, 1332 (Md.App. 1993) (in motion for recusal trial court's statement indicating that no witnesses would be heard other than parties was held to be particularly injudicious because "[t]he trial court's function is to hear witnesses"). *In Re Eastmoore*, 504 So.2d 756, 757-58 (Fla. 1987) (The public can have little confidence in the impartiality of a decision when the litigant is cut short in the presentation of her case and the decision maker's demeanor bears all the indica of prejudice and a closed mind") (citing Canon 3).

The judges disposition on these matters was wrongful and inappropriate because the denial of Petitioner's rights was not deserved, prejudiced Petitioner, and was contrary to the law. The termination was effectively a sanction for Petitioner's assertion of his rights to fair procedures for which Petitioner did not receive the process due. The judge's dispositions, therefore, exhibit a pervasive bias and prejudice that constitute a denial of the right to an impartial tribunal. *Liteky* supra at 545, 550. *Gardiner* at 1191-93.

4. Petitioner's letter-motion filed in response to the judge's termination of Petitioner's motions and for the judge's failure to respond to his Standing Order 2 letters

seeking discovery relief was effectively a motion for recusal for the judge's lack of impartiality, to which the judge should have but did not respond either by recusing himself sua sponte or by hearing the motion. See Facts at 1, 2, and 3 supra.

Petitioner's letter-motion was labeled as a motion to stay, but the reason for the request for a stay was the judge's violation of petitioner's constitutional and procedural rights, arising from the judge's evident lack of impartiality. The judge's failure to respond to the motion was itself a violation of petitioner's due process and procedural rights, and was an undeserved disposition that demonstrated such a pervasive bias and prejudice as to deprive petitioner a hearing before and impartial judge. Canon 3(b)(7). *Liteky* supra at 545, 550. Moreover, the judge's failure to respond effectively prevented meaningful review of the issues raised by Petitioner's motion on appeal, and the effects of the judges bias had become so pervasive as to prejudice any review of the merits of the case.

On the basis of the judge's failure to respond when the issue of the judge's lack of impartiality was raised by petitioner before summary judgment, this court has the discretion and duty to consider this issue. *Gardiner* at 1190-91.

5. The judge improperly carried forward its improper predisposition on Jensen/Wells' motive and intent into its summary judgment disposition. See Facts at 1, 2, and 4 supra.

The judge's statements in its order denying leave to amend as to Jensen/Wells showed that it had unlawfully and prematurely decided the issue of who to believe and the merits of the case in regard to opposing parties' motive and intent and the neglect of petitioner's mother before any evidence was presented, and as if to prove its predisposition injudiciously ignored the evidence clearly contrary to its predisposition when it was properly presented by petitioner on summary judgment.

The judge ignored multiple statements by defendants and Jensen/Wells, including

admissions by Jensen/Wells and defendants that indicated that their conduct was motivated by disability discrimination or by retaliation against petitioner in response to his reports of the neglect of his mother. In order to justify ignoring this material evidence the judge injudiciously failed to follow the law by calling it "inadmissible hearsay," even though the defendants' and Jensen/Wells own contemporaneous statements evidencing their state of mind were involved, and even if they were hearsay are specific hearsay exceptions. These are rules of evidence petitioner had every right to rely on for evidence in support of his claims, and which denial in this case rises to a constitutional violation. Moreover, the judge unevenly applied its disposition on hearsay and demonstrated its lack of impartiality by citing hearsay of defendant Mostrales in support of its disposition against petitioner.

Since the judge's evidentiary disposition involved evidence contrary to what the judge had previously wrongfully and prematurely decided, it evidences that the judge deliberately violated the law pursuant to his predisposition favoring opposing parties. FRCP 1. Canons 2A and 3B(2). *Gardiner* supra at 1192 ("When a judge passes judgment on parties before him without hearing all of the evidence and without a trial, we deem such comments highly injudicious"). *Id.* at 1193. *In Re Eastmoore* supra.

The judge also carried over its predisposition involving petitioner's pleadings of defendants retaliation and discrimination against him in response to his reports of the neglect of his mother by wholly ignoring Petitioner's allegations of the complaint including Petitioner's detailed allegations of the neglect of his mother's personal and health care, Petitioner's declarations including his declarations verifying the facts of the complaint, *and* Petitioner's considerable documentary evidence of the neglect of his mother's personal and health care that was the issue central to all his claims against all parties.

The fact that the judge ignored Petitioner's pleadings and the evidence supporting them was highly injudicious, appeared to and had the effect of a sua sponte motion to strike the allegations without a hearing, and clearly indicated the judge's lack of impartiality. Canons 2A and 3B(2). *Liteky*, *Gardiner*, *Goldberger*, *In Re Eastmore* supra.

6. The judge's lack of impartiality is evidenced by the judge's comments obliquely charging Petitioner with the fault for the length of the proceedings and the volume of the filings, and stating that the "heart" of the case was petitioner's despondency over the state of his relationship with his family and that his motivation for bringing this action was vengeance. See Facts at 6 supra.

In his opening paragraph of his summary judgment the judge stated that "[a]fter four years of contentious litigation, an intermediate appeal to the Ninth Circuit and a literal mountain of filed documents (occupying eleven large folders), this case has finally reached its final summary judgment stage." Considering the judge's actions set out above, along with the rest of the judge's order and the judge's "opinion" set out below, there is no doubt that this statement was intended to infer that the circumstances of the proceedings and the volume of the files were somehow petitioner's fault. This statement was undeserved and prejudiced Petitioner, because the real cause of the delay and the "mountain" of documents clearly lies elsewhere. The judge misrepresented by omission the fact that the "intermediate appeal" was reversed and remanded on the basis that the first judge in the case failed to treat the factual allegations of the complaint as true, a fact that involved a considerable and oppressive burden to Petitioner and which was not his fault.[1] Instead, fault for a considerable portion of the volume of the filed documents, therefore, rested squarely in the hands of the first judge and the opposing parties who had

[1] In writing his first appellant's brief, petitioner repeatedly and up to the last minute worked himself to exhaustion pondering the judge's reasoning without comprehending until it occurred to him as an epiphany that the judge had failed to treat the factual allegations of the complaint as true. It was an epiphany because, up to that point, Petitioner had a faith in the law and the fairness of the judicial system that had to be broken to recognize the judge's failure to follow the law.

influenced her to make a wrongful decision.

The judge's statement also disingenuously misrepresented his lack of fair and impartial management of the case that was a significant determinate of the volume of the filings. By failing to hear and decide the issues in dispute at the case management conference the judge ratified the abuses that already had occurred and gave its tacit approval for their continuation. Under the circumstances, Petitioner was obligated to file documents seeking relief and devote much space in his filings in fruitless protest about the oppressive and self-serving misrepresentations by opposing parties of the pleaded facts, and in seeking relief from discovery abuse that are merely illustrated above. Petitioner's own un-filed papers consist of a large volume of documents directed at fruitless efforts to meet and confer. Much of the volume of the filed documents derived from defendants' oppressive conduct and the fault for it lies with them and the judge, not with petitioner.

The judge's opening paragraph statement is therefore undeserved and disrespectful of the oppressive and sometimes extreme difficulties of five years of litigation by a person with significant health problems who began the litigation with no schooling in the law and naïve faith in the legal system, and who faced and suffered significantly from abusive litigation practices while the judge refused to hear or act on Petitioner requests for relief when he brought it to the judge's attention. The judge's comment was wrongful and inappropriate because it failed to arise from the judge's fair consideration of both sides of disputed issues. In such a context, the judge's statement was an undeserved innuendo that exhibited the judge's pervasive bias and prejudice, and prejudiced Petitioner in the reviewing courts. *Gardiner* supra at 1192, *Liteky* supra at 545.

In the closing paragraph of his summary judgment decision the judge stated his "opinion" as follows:

> On a side note, after four years of litigation, massive amounts of paper and numerous hours expended by all involved, the court is of the opinion that at the heart of this complicated lawsuit is a man despondent over the state of his relationship with his immediate family. It is the court's sincere hope that these differences are eventually healed or, at least ameliorated. But its is not the job of the court to provide vengeance or leverage to siblings involved in family disputes. The court believes that efforts to repair his tattered relationships will yield Jensen more promising results than litigation.

This statement of opinion is undeserved, prejudicial to petitioner, and incredibly disrespectful of the law and of Petitioner's sense of duty to his mother, and the personal sacrifices Petitioner had to make to come to her aid. The judge's opinion is necessarily based on failing to follow the law of the legal standards of review on summary judgment. The judge unlawfully failed to consider the pleaded issue of the neglect of his mother's personal and health care as Petitioner's motivation for his coming to his mother's aid as well as Petitioner's declarations and other evidence to that effect, and unlawfully drew an unsupported and unsupportable inference favorable to opposing parties. Moreover, no party provided evidence or alleged that Petitioner was despondent over his relationship with his siblings, or that he was motivated by vengeance, nor could they. [2]

The Judge's opinion was wrongful and inappropriate because it was undeserved, and because it was arrived at in violation of the law and indicated the judge's willingness to violate the summary judgment standards of review in deriving his opinions. In the context of a summary judgment motion and as the non-moving party, Petitioner's integrity, and good faith in bringing the suit should not be an issue considered by the judge, or if it is it should be assumed. The fact

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[2] Petitioner's decision to file a federal lawsuit was based on his research showing that their was no effective state oversight or remedy for institutional neglect of the elderly because "supposedly competent institutions designed to protect and vindicate the rights of [the institutionalized elderly] have consistently failed to do so." App.38 (¶ 85 of all versions of complaint). After making the decision, petitioner literally asked himself "why me" at the burden the decision imposed. Indeed, why ? The original complaint included a request for injunctive relief for his mother. App.39 (FAC ¶ 111(a)). Petitioner rushed to file the complaint because he feared that his mother would die as a consequence of the neglect of her health care. Any reasonable person would agree that is what occurred.

that it wasn't indicates that the judge's opinion of Petitioner was a wrongful and inappropriate factor in the judge's decision making and revealed the judge's personal bias and prejudice and a high degree of antagonism toward Petitioner such as to make a fair judgment impossible. *Liteky* at 550, 555. Moreover, the judge's opinion amounted to a gratuitous and undeserved personal attack on Petitioner's good name, reputation, honor, integrity and good faith that the judge had no right or lawful judicial reason to make, and for which Petitioner was denied due process. *Gardiner* supra. In such a context the judge's opinion exhibited a pervasive bias and prejudice. *Id.*

7. This court has jurisdiction to hear the lack of impartiality issue because the issue was raised but not heard in the district court and in the court of appeals. See Facts at 4 and 7 supra.

Petitioner raised the issues of the judge's comments and dispositions that indicated the judge's lack of impartiality in his proposed oversize brief, in his request for judicial notice of the sections of the oversize brief that dealt with those issues, in his appellant's brief, and in his motion for rehearing. The court of appeals, however refused to consider it. On the basis that the issue was effectively raised but not heard in the lower courts, this court has discretion and duty to hear the issue of the lack of impartiality and pervasive bias and prejudice in the district court. This court also as the discretion and duty to hear the issue sua sponte. *Gardiner* supra at 1190-91.

CONCLUSION

The totality of the circumstances and the examination of the words and actions of the district judge as a whole show that he had a "deep-seated favoritism or antagonism" against Petitioner "that would make fair judgment impossible." Moreover, the judge's failure to hear and act on Petitioner's letter-motion raising the issue of his lack of impartiality, and the judge's

comments involving innuendo and opinion about Petitioner that were undeserved are by themselves sufficient wrongful and inappropriate conduct to show for that Petitioner was denied his 14th Amendment rights to an impartial tribunal. Moreover, the conduct of the proceedings in this case cannot stand up to public scrutiny. Any reasonable person with a knowledge of the facts would believe that the proceedings were fundamentally unfair to Petitioner.

The decision of the district court on the merits of Petitioner's claims also cannot stand up to public scrutiny. Any reasonable person, and any reasonable judge would consider that the district judge's failure to hear Petitioner's allegations and considerable evidence of the neglect of his mother's personal and health care and of the defendants' retaliatory and discriminatory motive and intent was unfair and unreasonable. If this evidence is actually considered, any reasonable person and any reasonable judge would believe that the case was wrongfully decided.

The dispositions of the federal courts in this case bring the fairness of the federal judiciary into serious question. This court cannot have the discretion to fail to hear and act on this case.

REQUEST FOR RELIEF

This court should rehear this case and issue a summary order vacating the judgment on the basis that the proceedings in the district court were unfair in fact, and that the proceedings in this case have the appearance of unfairness.

Respectfully submitted by, Tom Jensen,
Petitioner in propria persona
P.O. Box 614
Oakland, CA 94604

INDEX TO APPENDIX

Opinions and Orders:

The full text of the Opinions and Orders and Second Amended Complaint are set out in the petition for writ of certiorari.

Federal Statutory Provisions:

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Federal Rules of Civil Procedure:

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Other Relevant Materials:

Pg.27, ¶¶ 89 and 90 of (proposed) 3rd amended complaint (received 6/11/03) App.1

Pg.7 of Jensen/Wells 7/10/03 opposition to petitioner's motion to file 3rd amended complaint (ER 195, Doc.No.242) App.2

Pg.18 (denying leave to file 3rd amended), of Judge Walker's 7/29/03 order complaint (ER 196, Doc.No.248) App.3

Pgs.7-8 of Petitioner's 9/23/03 motion for reconsideration (Doc.No.253) App.4-5

Pgs.3-4 (threatening sanctions) of Judge Walker's 1/5/04 Order (Doc.No.278) .. App.6-7

Pgs.5-6 of Petitioner's 3/9/04 motion to strike Kaiser's answer (Doc.No.295) ... App. 8-9

Pgs.5-7 of Petitioner's 3/26/04 motion for discovery sanctions against Kaiser (Doc.No.302) App.10-12

Kaiser's 4/12/04 letter to Judge Walker (concerning petitioner's pending Motions) (Doc.No.304) App.13-14

Judge Walker's 4/27/04 Order "terminating" petitioner's motions (Doc.No.307)..... App.15-16

Petitioner's 9/14/04 letter-motion raising the issue of Judge Walker's lack of impartiality and requesting a stay to settle pending discovery disputes (Doc.No.321) App.17-18

Pgs.33-34 of Judge Walker's 1/31/05 summary judgment (Doc.No.389) App.19-20

Jensen/Wells' 6/7/99 e-mail message stating state of mind concerning Petitioner and his reports of the neglect of his mother's care (ER 71) App.21-22

Exhibit C, pg.3 of the Second Amended Complaint (defendant Mostrales' statement concerning petitioner) (Doc.No.311) App.23

Pgs.5-7, ¶¶ 14-22 of the Second Amended Complaint (petitioner's factual allegations of the neglect of his mother's personal and health care) (Doc.No.311) App.24-26

Petitioner's 9/7/04 declaration verifying ¶¶ 11-74 of the Second Amended Complaint (¶ 14) (ER 183-184, Doc.No.343) App.27-28

Pg.1 of Judge Walker's summary judgment order (statement concerning the length of the proceedings and the volume of the files) (Doc.No.389) App.29

Pg.2 of the Memorandum decision of the court of appeals filed in the district court on 7/1/02 (ER 1, Doc.No.136) App.30

Petitioner's Second Reply to Motions to Dismiss in Judge Illston's court (Doc.No.58) App.31

Pg.10 of the transcript of the case management conference in the Illston Court (concerning State and Sweet Home defendants proposal to strike ("redact") petitioner's pleadings of his allegations, inter alia, of the neglect of his mother's personal and health care (ER 4, Doc.No.138) App.32

Pgs.34-35 of Judge Walker's summary judgment order (containing Judge Walker's opinion of petitioner) App.33-34

Pg.4 of petitioner's declaration in support of petitioner's reply to Kaiser Defendants' opposition to his motions requesting reconsideration of His motion to strike Kaiser's answer and for discovery sanctions and in support of petitioner's opposition to to defendants' motions for summary judgment (ER 158, Doc.No.351) App.35

Pg.42 of petitioner's proposed oversized brief filed in the court of appeals, also

filed as part of request for judicial notice (concerning unfair proceedings in the district court and the prejudice it caused petitioner) App.36

Page 4 of Appellant's brief (concerning the improper conduct throughout the Proceedings causing prejudice to petitioner) App.37

¶ 85 of Second Amended Complaint (same in all versions) (Doc.No.311) App.38

Pg.36, ¶ 112(a) of the original filed complaint (concerning request for preliminary injunction for petitioner's mother) App.39

Federal Statutory Provisions

28 United States Code §§ 455(a) and (b)(1):

(a) Any justice, judge, or magistrate [magistrate judge] of the United States shall disqualify himself in any proceeding in which his impartiality might reasonably be questioned.

(b) He shall disqualify himself in the following circumstances:

(1) Where he has a personal bias or prejudice concerning a party, or personal knowledge of disputed facts concerning the proceedings …

Federal Rules of Civil Procedure

Rule 1: These Rules govern the procedure in the United States district courts in all suits of a civil nature whether cognizable as cases at law or in equity or in admiralty, with the exceptions stated in Rule 81. They shall be construed and administered to secure the just, speedy, and inexpensive determination of every action.

Model Code of Judicial Conduct of the American Bar Association

Canon 2(A): A judge shall respect and comply with the law and shall act at all times in a manner that promotes public confidence in the integrity and impartiality of the judiciary

Canon 3(B)(2): A Judge shall be faithful to the law and maintain professional competence in it. A judge shall not be swayed by partisan interests, public clamor or fear of criticism.

Canon 3(B)(7): A judge shall accord to every person who has a legal interest in a proceeding, or that person's lawyer, the right to be heard according to law. A judge shall not initiate, permit, or consider ex parte communications, or consider other communication made to the judge outside the presence of the parties concerning a pending or proceeding …

causing the visitation restrictions to be imposed as an alternative in the interim. Paragraphs 63, 64, 75(e), 87(d), 93(h); and Exhibit D, pgs.2-3 are adopted and incorporated herein by this reference. Paragraphs 14-22, 31-34, 39, 41, 43, 46-48, 52, 53, 56, 57, 59, 60, 64, 65, & 75 (including subparagraphs (a) – (f)); and Exhibits A, C, and D are adopted and incorporated in this paragraph by this reference as support of these allegations.

89. The "Visitation Restrictions for Tom Jensen," were issued and imposed, and the investigations by the STATE DEFENDANTS were deliberately delayed, without notice to the plaintiff, without a hearing, without valid legal authority, without a right of appeal, without just cause, with discriminatory purpose, motive, intent, and effect, and in retaliation for plaintiff's reports of neglect of his mother's care and his advocacy for its correction. Paragraphs 39, 53, 58, 59, 63-65, 71-75 (including subparagraphs (a) – (f) of ¶ 75), 90, & 91(d)); Exhibits. A, C, and D; and Claim II are adopted and incorporated in this paragraph by this reference as support of these allegations.

90. STATE DEFENDANTS, with deliberate indifference to plaintiff's constitutional rights, recklessly and without due process, acceded to fraudulent, defamatory, pretextual, and retaliatory allegations against plaintiff, which were made to them by SWEET HOME and FAMILY DEFENDANTS, and which were meant to discredit, and defame him and to discredit his reports of neglect of his mother. The reliability of the allegations against plaintiff were not questioned nor given scrutiny, while plaintiff's reports and evidence of neglect of his mother's personal and health care, and retaliation against him for reporting and advocating for its correction were disregarded on the basis that he was allegedly "mentally ill," "mentally unstable," and had "mental problems." Paragraphs 39, 45, 47, 48, 51, 53, 56, 59, 64, & 75 (including subparagraphs (a) – (f)), & 91(d); and Exhibits A, C, and D are adopted and incorporated in this paragraph in support of this allegation by this reference.

91. The acts pursuant to the agreement, meeting of the minds, and conspiracy among these defendants are the following:

(a) Unreasonably, unjustly, and unlawfully barring plaintiff from the defendant SWEET HOME ONE CARE FACILITY for five months in violation of state regulations while the STATE DEFENDANTS' investigations were deliberately delayed in violation of state law. Paragraphs 46, 52,

APP. 1

had unduly delayed and delay would prejudice the defendant, and where plaintiff's contention on appeal seemed hollow and akin to bad faith.

E. The First Claim for Relief Does Not State an Unruh Act or Section 1983 Claim Against Beth Wells and Peter Jensen

By way of the Proposed Third Amendment Complaint, Plaintiff seeks to reinvolve his siblings, the children of Marguerite Jensen, as Defendants in this action for purported violations of Plaintiff's civil, constitutional and statutory rights pursuant to California Civil Code §51 and 42 U.S.C. §1983. Notwithstanding Plaintiff's assertion of "facts" and the requirement at this procedural stage that the Court accept as true all well-pled facts, nonetheless, BETH WELLS and PETER JENSEN respectfully submit that Plaintiff has failed to plead and cannot plead "facts" that would subject the FAMILY DEFENDANTS to liability under California Civil Code §51 or 42 U.S.C. §1983. Plaintiff has failed to allege sufficient facts to plead a viable claim against BETH WELLS and PETER JENSEN under 42 U.S.C. §1983. The gist of Plaintiff's allegations against the FAMILY DEFENDANTS is their purported communications with the other defendants regarding their concerns as to Plaintiff's conduct which they believed to be disruptive and detrimental to the peace and proper care of their mother. In an effort to establish tete FAMILY DEFENDANTS' participation in a purported conspiracy to violate Plaintiff's access to SWEET HOME and Marguerite Jensen, Plaintiff alleges that the FAMILY DEFENDANTS effected "a meeting of the minds" with the other Defendants that Plaintiff was "mentally ill," "mentally unstable," and had "mental problems." Plaintiff then alleges that:

> STATE DEFENDANTS, with deliberate indifference to Plaintiff's constitutional rights, recklessly and without due process, acceded to fraudulent, defamatory, pretextual, and retaliatory allegations against Plaintiff, which were made to them by Sweet Home and FAMILY DEFENDANTS, and which were meant to discredit, and to defame him, and to discredit his reports of neglect of his mother."
> [Proposed Third Amended Complaint, paragraph 90.]

//

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agents effecting a constitutional deprivation. Johnson v Knowles, 113 F3d 1114, 1119 (9th Cir 1997).

5/14/03 Order (Doc #224), at 8-9.

Jensen fails to cure the deficiency of his earlier proposed pleading. Jensen has added allegations and exhibits indicating that Peter Jensen and Beth Wells, at times acting through their agent Don Wells, suggested certain visitation restrictions to state officials. Prop TAC, ¶¶ 75(a), 87, Exh D at 1-2. But even the attached exhibits, if taken as true, acknowledge that plaintiff's siblings merely expressed their views to state officials in the hope that they would agree. To the extent the ultimate decision distinctly remained with public officials, Jensen's siblings were therefore not the cause of plaintiff's purported constitutional deprivation. See Prop TAC, Exh D at 2 ("Don and I have reworked the restrictions so that we think they will be approved by CCL. Of course, they must satisfy your concerns."); id, Exh D at 3 (letter by staff attorney from California Department of Social Services rejecting proposed restrictions by Peter Jensen).

Plaintiff has failed to state factual allegations to support a claim that his siblings were willful participants in the particular state action effecting a constitutional deprivation. While plaintiff's family members may have expressed their views and preferences to state officials, the proposed TAC fails to allege that Peter Jensen and Beth Wells were "joint" participants in the decision to impose the visitation restrictions at issue. Accordingly, leave to amend plaintiff's section 1983 claim to add his siblings is DENIED.

United States District Court
For the Northern District of California

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Proposed SAC, TAC ¶ 91(d). Additionally, as plaintiff has alleged, the visitation restrictions would not have been approved and imposed by state defendants but for (1) State defendants' ratification, without the process due, of these false and discriminatory allegations made by Peter Jensen and Beth Wells pursuant to their improper motives of retaliation and discrimination, Id ¶¶ 89, 90. (2) State defendants' policies that favored and had the effect of favoring care custodians who make false and retaliatory allegations against persons reporting neglect and abuse of the elderly in California long-term care facilities. Id. ¶¶ 92, 93. and (3) State defendants' own discrimination against plaintiff on the basis of disability, Id 91(d).

The foregoing facts give rise to the reasonable inference at the pleading stage that Peter Jensen and Beth Wells acted pursuant to a corrupt agreement with State defendants to violate plaintiff's due process rights as plaintiff has alleged, rather than "merely express[ing] their views to state officials in the hopes that they would agree." The corrupt agreement or conspiracy and acts pursuant to the agreement is the "something more" that shows the joint action constituting state action by Peter Jensen and Beth Wells. [5] See *Howerton v. Gabica*, 708 F.2d 380, 383 (9th Cir. 1983) ("One way the 'joint action' test is satisfied is if a conspiracy is shown.").

B.

THE COURT HAS WRONGFULLY DEPENDED ON OPPOSING PARTIES' FACTS OUTSIDE THE PLEADINGS TO SUPPORT ITS DECISION OF LACK OF JOINT ACTION

The court's decision reaching the conclusion that "[b]ut even the attached exhibits, if taken as true, acknowledge *that plaintiff's siblings merely expressed their views to state officials in the hopes that they would agree*," mirrors the statement of Peter Jensen and Beth Wells that "[t]he gist of plaintiff's allegations against the FAMILY DEFENDANTS is their purported communications with the other defendants regarding their concerns as to Plaintiff's conduct which they believed to be disruptive and detrimental to the peace and proper care of their mother." [6] As set out above, the

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[5] Conspiracy means a combination or agreement to violate or disregard the law conferring equal liability to the co-conspirators. Plaintiff uses the words "corrupt agreement and meeting of the minds," and "conspiracy" interchangeably as words and phrases having the same legal meaning.

court in making its foregoing statement, wholly ignored the factual allegations of the complaint that alleged facts and evidence of Peter Jensen's and Beth Wells' improper motives of retaliation and discrimination on the basis of disability and plaintiff's arguments setting out these things. Additionally, the appearance is unavoidable that Peter Jensen and Beth Wells made these improper statements outside the pleadings in their opposition motions with the intention to influence the court to make a wrongful decision of fact and law.

C.
STATE DEFENDANTS' BELATED DOCUMENT PRODUCTION PROVIDES DIRECT EVIDENCE THAT SUPPORTS PLAINTIFF'S ALLEGATIONS OF CONSPIRACY

The court in refusing to draw reasonable inferences of conspiracy in plaintiff's favor has imposed an impossible barrier to overcome to attain the court's requirements for pleading state action by Peter Jensen and Beth Wells, and serves to reward the defendants for withholding evidence and manipulating the rules. The court is informed of the fact that there was no record of the state proceedings related to the visitation restrictions available to plaintiff at the time the FAC was drafted and that he remained ignorant of the machinations among the defendants that constituted joint action at the time the FAC was drafted, that initial disclosures by opposing parties had been delayed or not made, and that State defendants had withheld documents plaintiff had requested. [7] Notwithstanding this lack of direct evidence, a corrupt agreement and meeting of the minds or conspiracy to deny

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[6] Peter Jensen and Beth Wells could claim a good faith defense in an *answer*, and assert it in a *motion for summary judgment*, but the defendants and the court cannot ignore the pleadings and presume that such a defense exists on the basis of facts outside the pleadings and prematurely decide the issue on that basis. See plaintiff's Reply to Family Defendants' Opposition to Plaintiff's Motion for Leave to Amend and Motion for Reconsideration with Memorandum of Points and Authorities, Doc # 244 at pg. 5, lns. 4-11. Plaintiff has repeatedly complained to and warned the court of the use of facts outside the pleadings by opposing parties. See Id., and see e.g. Plaintiff's Opposition to State Defendants' Motion to Dismiss and Plaintiff's Motion for Summary Judgment on Procedural Due Process Claim with Memorandum of Points and Authorities, Doc # 220 at pg. 6, lns. 14-19. The court's wrongful factual finding is now a specter of prejudice to plaintiff overhanging the proceedings unfairly adding to past prejudice..

[7] See FAC, SAC, proposed TAC ¶¶ 71-75, Plaintiff's Notice and Motion for Leave to Amend, Doc # 196 at pgs. 5-8, and plaintiff's April 22, and June 16, 2003 letters regarding discovery dispute over document production by State defendants.

reconsideration under FRCP 60(b) is not a "substitute for appeal").

Plaintiff moves the court to grant leave to file a motion for reconsideration of its May 14 and July 31, 2003, orders. Because the merits of plaintiff's motion apply only to the July 31, 2003, order, such order is the only one the court considers. Plaintiff's motion relies on the last two bases for reconsideration, Civ LR 7-9(b)(2) and (3). The court considers plaintiff's contention under Civ LR 7-9(b)(3) first.

A

Plaintiff argues that the court failed to consider plaintiff's material facts and dispositive legal theories. Pl Mot (Doc # 253) at 2. Plaintiff fails, however, to bring to the court's attention any dispositive legal theories or material evidence that the court did not address in its previous order. Plaintiff argues that the court failed to treat the "factual allegations of the complaint as true and draw all reasonable inferences in plaintiff's favor." Id. Plaintiff does not argue, nor could he, that the court disregarded the appropriate legal standard for a motion to amend. Instead, plaintiff argues that the court misapplied the standard.

Plaintiff's motion thus evinces a failure to understand the distinction between a claim that the court disregarded a legal argument and a claim of disagreement with the court's decision. If a party raises, and the court fails to address, a dispositive legal argument, that party may bring a motion for leave to file a motion for reconsideration to allow the court an opportunity to address its error. See Civ LR 7-9(b). A motion for leave to file a

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motion for reconsideration is not an appropriate vehicle to vent frustration with a court's order, nor is it a second chance to raise the same arguments.

The court clearly rejected plaintiff's argument that Peter Jensen and Beth Wells acted jointly with state officials. Plaintiff's fervent disagreement with the court's previous order does not provide grounds to file a motion for leave to file a motion for reconsideration. Indeed, the Civil Local Rules state that a party may be subject to sanctions for "repeat[ing] any oral or written argument made by the applying party in support of or in opposition to the interlocutory order in a motion for leave to file a motion for reconsideration." Civ LR 7-9(c). Repeated and meritless motions for leave to file motions for reconsideration needlessly slow the litigation process. Although the court finds that imposing sanctions at this time is not appropriate, plaintiff is admonished that "although he is * * * representing himself in this action, he is nevertheless obligated to follow the same rules as represented parties." King v Atiyeh, 814 F2d 565, 567 (9th Cir 1987).

B

Plaintiff also argues that evidence unavailable at the time that the court considered plaintiff's earlier motion provides a basis for the court to reconsider its earlier ruling. Plaintiff's motion on this ground may more properly be construed as a motion for leave to amend, because nothing in the court's previous order needs to be "reconsidered" to determine whether plaintiff's further allegations suffice to state a claim against

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failing to give plaintiff fair notice, and some are insufficient as a matter of law. *Heller Financial, Inc. v. Midwhey Power Co., Inc.*, 883 F.2d 1286, 1294-95 (7th Cir. 1989). *Wyshak v. City Nat. Bank*, 607 F.2d 824, 827 (9th Cir. 1979).

The foregoing insufficiencies of Kaiser defendants pleadings' prejudice plaintiff by, inter alia, requiring plaintiff to prove facts that should be admitted by Kaiser, causing delay, waste of time and oppressing plaintiff. They also cause plaintiff the necessity of engaging in unnecessary discovery, unnecessarily confuse the issues and mislead the court. FRCP 1.

ISSUES TO BE DECIDED

1. Are Kaiser defendant answers insufficient because they are not based on a reasonable inquiry under the circumstances?

2. Are allegations in Kaiser defendants' answer that factual allegations of the SAC are "irrelevant" or are "legal conclusions that do require a response" proper pleadings under FRCP 8(b)?

3. Are Kasier defendants' affirmative defenses insufficiently pleaded, and/or are they insufficient as a matter of law?

4. Has plaintiff been prejudiced by Kaiser defendants' answer and related conduct?

STATEMENT OF FACTS

There are two sources of knowledge and information in Kaiser defendants' possession that were readily available to Kaiser defendants for pleading their answer. One source of readily available information were the documents alleged in the complaint, which include three letters from plaintiff to Kaiser defendants (Exhibit A). The other source of readily available information were plaintiff's mother's Kaiser medical records including Kaiser medical records for plaintiff's mother for the year 1998, Kaiser medical records of plaintiff's visits with his mother to defendant Bill Jue MD, Kaiser medical records related to plaintiff's visits with Dr. Derek Jue, Kaiser medical records related to Kaiser defendants' contact with the Ombudsman, and Kaiser medical records related to

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plaintiff's mother's admission to the hospital with acute symptoms of urinary tract infection (Exhibit B).[1]

Plaintiff's mother's medical records were in Kaiser counsels' possession well before they answered the complaint and well before their answer was due . Plaintiff received the medical records excerpted herein by personal service from then Kaiser counsel Steve Chu on or about Nov. 5, 2003 in response to plaintiff's document requests. Kaiser's answer was due on January 29, 2004, 14 calendar days or ten working days after the court order denying Kaiser defendants' motion to dismiss. Kaiser defendants answer was actually served on February 18, 2004

Plaintiff's pleadings and Kaiser defendants' answers concerning these sources of knowledge and information that Kaiser defendants failed to use for pleading purposes, which are the subject of this motion, are of the following general categories of the evidence just enumerated.

PLAINTIFF'S PLEADINGS AND KAISER DEFENDANTS' ANSWERS RELATED TO PLAINIFF'S LETTERS TO KAISER DEFENDANTS

Plaintiff has pleaded and verified that he sent three letters to Bill Jue MD. SAC ¶ 30. Two of the letters were identified by date, one sent to defendant Jue dated May 26, 1999, SAC ¶ 31, and the other dated June 24, 1999, sent to defendant Jue, delivered in person to the Patient Representative of Kaiser – Milpitas, and also sent to Peter Jensen and Beth Wells. SAC ¶ 32. The third letter was dated September 3, 1999. Kaiser defendants admit receiving these letters, but do not admit the contents of the letters that plaintiff has plainly pleaded.

Paragraph 26: Paragraph 26 states that "After the second visit to said defendant Bill Jue MD, which was after Mrs. Jensen had dislodged the mucous plug from her lungs, the clear then purulent mucous that was observed by the plaintiff was expelled by her coughing."

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[1] Kaiser defendants' medical records were produced form three separate Kaiser facility sources identified as "Kaiser Medical Center Milpitas PMG Vol 2" (clinic records for years 1998 to 2000), "Kaiser Medical Center Santa Clara PMG Vol 1," (hospital records for year 2000), "Kaiser Medical Center Hayward PMG Vol 1" (hospital records years 1998, 2000) "Kaiser Medica[illegible] KFH Vol 2 (hospital records for year1998). Each set of records has a cover shee[illegible] numbered beginning with the number one in bold type in the lower right hand corn[illegible]

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MEMORANDUM OF POINTS AND AUTHORITIES

ISSUES TO BE DECIDED

Have Kaiser defendants without substantial justification failed to comply with Rule 26(a) by not providing plaintiff with required disclosures under Rule 26(a)(1)(A), (B), and (D)?

Has plaintiff been harmed by Kaiser defendants' failure to comply with Rule 26(a) and by Kaiser defendants' persistent violation of the federal rules and the case management order?

Have Kaiser defendants persistently and egregiously violated Rules 11, 16(f) and 26(g) and the court's case management order by failing to do a reasonable inquiry under the circumstances before filing their documents, and by serving their responses to plaintiff's document requests in the first instance without a privilege log in violation of the court's case management order, and in the second instance by refusing to waive any allegedly assertable privileges and again failing to produce a privilege log for privileges they had claimed?

Have Kaiser defendants acted willfully and in bad faith?

Has plaintiff been substantially prejudiced and injured by Kaiser defendants' conduct?

STATEMENT OF FACTS

The case management conference occurred in this action on September 23, 2003. Using the date of the conference as the start of the time period, Kaiser defendants initial disclosures were due to be served to plaintiff on October 6th.

On October 2, 2003 this court issued its case management order. The order stated the following on page 1:

"No generalized claims of privilege or work product protection shall be permitted. With respect to each communication for which a claim of privilege or work product is made, the asserting party must at the time of its assertion identify: (a) persons making and receiving the privileged or protected communication, including affirmation that no unauthorized persons have received the communication, (c) date of the communication and (d) subject matter of the communication. Failure to furnish this information at the time of the assertion will be deemed a waiver of the privilege or protection."

Plaintiff served his request for documents to Kaiser defendants on August 29, 2003 (copy of proof of service attached herein as Exhibit A) After the case management conference on September 23, 2003, Kaiser counsel Steve Chu asked for three extensions of time for their production of documents. In his discussions with Mr. Chu in regard to these extensions of time, plaintiff inquired about the extent of his document production. Mr. Chu indicated to plaintiff that Kaiser defendants would not claim privileges for his mother's and father's medical records and for documents he had requested from the personnel records of Minerva Mostrales. Plaintiff relied on Mr. Chu's representations in granting the extensions of time he requested and in the decisions plaintiff made related to his motion to compel which he filed on November 3, 2003. On Nov. 6, 2003, Kaiser defendants' served plaintiff their response to plaintiff's document requests (copy of Kaiser response attached herein as Exhibit B). In their response, Kaiser defendants claimed generalized privileges without a privilege log and produced documents that appeared to be solely documents contained in plaintiff's mother's medical records for the years 1998-2000.

On January 5, 2004, the court issued its order denying Kaiser defendants' motion to dismiss. Kaiser defendants' answer was due on January 19th . On February 4, 2004, plaintiff initiated meet and confer with Kaiser defendants by telephone and followed-up with a series of 5 letters, the last on February 20th. In these communications, plaintiff raised issues for discussion that included the inadequacy of the Kaiser defendants responses to plaintiff's document requests, Kaiser defendants' failure to comply with the case management order by their failure to produce a privilege log with their response to plaintiff's document requests and their consequent waiver of privileges according to the terms of the order, Kaiser defendant's failure to answer the complaint, and Kaiser defendants' failure to make their initial disclosures. Kaiser defendants made three replies by letter.

On February 18th, Kaiser defendants answered the complaint contrary to plaintiff's suggestion in his meet and confer letters that their answer be delayed until they had done a reasonable inquiry under the circumstances. On March 15, 2004 Kaiser defendants produced a revised response to plaintiff's document requests (copy attached herein as Exhibit C) without waiving any privileges and without producing a privilege log, and produced only one additional document. In their response to

revised Request No.'s 1, 2, 3, 4, 5, 6, 7, 8, 9, 10, 11, 12, 14, 16, Kaiser defendants inconsistently claimed alleged "diligent search" without locating any allegedly privileged responsive documents, for some requests, but not for others, and promised a privilege log if any were later found. In their responses to Request No.'s 13, 15, 17, 18, 20, 21, 23, and 24 Kaiser defendants again claimed generalized privileges without a privilege log and without explaining lack of production.

Kaiser defendants' first responses to plaintiff's document requests appear to have included only plaintiff's mother's medical records and no documents from any other source. The medical records are responsive to some of plaintiff's document requests other than for the medical records themselves, but do not appear to contain any documents related to any allegations Minerva Mostrales' or any other person made against plaintiff.

Kaiser defendants second responses to plaintiff's document requests after meet and confer contained only the following document which is included as the last ~~two~~ three pages of Exhibit C attached herein: Defendant Bill Jue M.D.'s "Unusual Occurrence Report" dated 9/7/99.

Kaiser defendants have not disclosed the identity of persons likely to have discoverable information relevant to their defenses and the identity of the subjects of the information, nor have they produced a copy or description by category of documents and things in their custody and control that are relevant to their defenses.

ARGUMENT

KAISER DEFENDANTS HAVE NOT MADE THEIR INITIAL DISCLOSURES

Kaiser defendants have not disclosed the identity of persons likely to have discoverable information and the subjects of their information Kaiser defendants may use to support their defense as required by Rule 26(a)(1)(A).

Only one of Kaiser defendants' documents produced in response to plaintiff's document requests appears relevant to their defenses, but only if construed in their favor. See last two pages of

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April 12, 2004

VIA FEDERAL EXPRESS

Hon. Vaughn R. Walker
U.S. District Court
Northern District of California
450 Golden Gate Avenue
San Francisco, CA 94102

Re: Tom Jensen v. Sweet Home Care
U.S.D.C. No. C 00-03261

Hon. Judge Walker:

On March 26, 2004, plaintiff filed a motion against Kaiser Foundation Health Plan, Inc., Kaiser Foundation Hospitals, The Permanente Medical Group, Inc., and Bill Jue, M.D. ("Kaiser defendants") concerning their Rule 26(A) disclosures. The motion is set for hearing on June 3, 2004.

This motion is in essence a discovery motion. The October 2 CMC order specifically provides that "The court will not entertain formal motions to compel discovery without prior leave of court. Discovery disputes should be brought to the court's attention by: (1) telephone conference with the court and all parties scheduled by the court, or (2) letter not exceeding two pages, with copies served on all parties, and advising the court that a dispute exists and its nature."

The Court therefore should not entertain Mr. Jensen's motion because he has not obtained the Court's permission before filing this motion. The Kaiser defendants are ready to oppose the motion on its merit, unless otherwise directed by the Court. Please direct your staff to advise me

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before May 3, 2004, ten days before the due date for Kaiser's opposition on May 13, if an opposition is required. Thank you very much.

Very truly yours,

Cindy S. Yau

CSY:mb
Cc. Tom Jensen ✓
Sonia Martin
Susan King

APP. H

FILED

APR 2 7 2004

RICHARD W. WIEKING
CLERK, U.S. DISTRICT COURT
NORTHERN DISTRICT OF CALIFORNIA

United States District Court
For the Northern District of California

IN THE UNITED STATES DISTRICT COURT

FOR THE NORTHERN DISTRICT OF CALIFORNIA

TOM JENSEN,

Plaintiff,

v

SWEET HOME ONE CARE FACILITY, et al,

Defendants.
_____/

No C-00-3261-VRW

ORDER

Plaintiff recently filed two motions. Plaintiff first moves the court to strike the Kaiser defendants' answer to plaintiff's second amended complaint. Pl Mot (Doc # 296). Plaintiff also moves the court for various discovery-related relief, including sanctions. Pl Mot (Doc # 302).

The parties are scheduled for a dispositive motions hearing date of October 28, 2004. The fact discovery deadline in this case is September 30, 2004.

The court's standing orders require a party to obtain leave of court before filing a motion to compel discovery responses. See Standing Orders at ¶ 2. To streamline this

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litigation, the court deems it appropriate to extend this requirement to all motions. Accordingly, unless the parties are granted leave by the court for good cause shown, no motions will be heard prior to the October 28, 2004, dispositive motions hearing date. Leave may be requested by:

1. Requesting a telephone conference with all parties or
2. Sending a letter to the court, not exceeding two pages, with copies served on all parties.

As noted above, plaintiff has two pending motions. The court TERMINATES plaintiff's motions to strike and for various discovery-related relief and VACATES their respective hearing dates. If plaintiff seeks to strike the Kaiser defendants' answer, he may include such an argument in any dispositive motion to be heard on October 28, 2004. If plaintiff seeks to bring a discovery-related issue to the court's attention, he may file a letter, not exceeding two pages, alerting the court to the nature of the dispute.

IT IS SO ORDERED.

VAUGHN R WALKER
United States District Judge

United States District Court
For the Northern District of California

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Tom Jensen
PO Box 614
Oakland, CA 64604
(510) 918-6667

FILED
SEP 14 2 11
CLERK, U.S. DISTRICT COURT
NORTHERN DISTRICT OF CALIFORNIA

Re: Jensen v. Sweet Home, C-00-3261 VRW

Judge Vaughn R. Walker
US District Court, Northern District of California
450 Golden Gate Ave.
San Francisco, CA
ss

Sept. 14, 2004

Dear Judge Walker,

Pursuant to the court's April 27 Order, plaintiff requests leave by this letter to file a motion to stay.

In its 1/4/04 Order, pgs. 11-12, the court stated that "It may be that plaintiff *will be unable to unearth* any evidence of agreements between Sweet Home One and Kaiser to deny plaintiff his rights" (emphasis added), which can be addressed in a motion for summary judgment.

In spite of plaintiff's comprehensive and successive document requests trying to elicit information, besides plaintiff's mother's medical records, Kaiser defendants have produced only their initial disclosures of 3 documents, two of which were plaintiff's letters. While admitting they have files of relevant documents, Kaiser defendants have claimed blanket privileges and objections to plaintiff's document requests without producing any documents beyond their initial disclosures, and without producing any privilege log despite the court's order requiring one. Kaiser defendants have also provided virtually no answers to plaintiff's interrogatories. What information they have provided has been in belated and untimely updates, giving clear evidence that Kaiser failed to do a reasonable inquiry before responding in the first instance, and that their objections were frivolous and made for the purpose of delay. Like State and Sweet Home defendants, Kaiser defendants have refused to agree to stipulate to low-cost depositions. Given Kaiser's discovery conduct, however, depositions would be expected to be unproductive and wasteful of plaintiff's time and resources. Kaiser defendants have closed off all avenues for discovery of information to plaintiff.

Plaintiff filed two motions asking for sanctions against Kaiser defendants for violation of the case management order, for persistent violation of the federal rules, and for failing to do reasonable inquiries before filing their answer and serving their responses to plaintiff's discovery requests. In response to Kaiser defendants' 4/12/04 letter addressed directly the court and which was not served, the court "terminated" plaintiff's motions, and ordered plaintiff not to file any motions without leave of the court and to ask the court for discovery relief by two page letter pursuant to the court's standing orders. Plaintiff has asked for such relief, but the court has failed to respond in spite of the court's standing orders that states that "the court *will* contact the parties to resolve the dispute" (emphasis added). The court has effectively closed off all avenues for discovery relief to plaintiff.

A civil trial is a quest for truth. Instead of seeking the truth, Kaiser defendants and the court have closed off all avenues for discovery of information to plaintiff. "Mutual knowledge of all the relevant facts gathered by both parties is essential to proper litigation." *Hickman v. Taylor*, 329 U.S. 495, 507 (1947). "[T]he spirit of the rules is violated when advocates attempt to use discovery tools as tactical weapons rather than to expose the facts by ... unnecessary use of tactical weapons or evasive responses." *Advisory Committee Notes*, 1983 Amendment.

The court has given ample evidence of a predisposition favoring opposing parties. Besides failing to grant plaintiff discovery relief, the court has, like the previous court before appeal, failed to treat the factual allegations of the complaint as true and draw all reasonable inferences in plaintiff's favor. Plaintiff had alleged that Peter Jensen and Beth Wells had acted with improper motives in advocating for the visitation restrictions. Instead of treating these allegations as true, this court adopted the opposing parties factual contention advanced in their motion to dismiss that Peter

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Jensen and Beth Wells had instead acted in good faith in reaching its decision on plaintiff's motion to amend. Additionally, the court clearly failed to treat plaintiff's factual allegations of neglect of his mother's personal and health care as true. Peter Jensen and Beth Wells by clear inference from these facts would be presumed to have acted in bad faith if plaintiff's allegations of the neglect of his mother's personal and health care were treated as true.

The court in failing to treat the factual allegations of the complaint as true and drawing all reasonable inferences in plaintiff's favor, refusing to even consider any of plaintiff's requests for discovery relief, and other such incidents beyond the space and scope of this letter motion, raises the issue of the threat that a wrongful decision will be made based on bias and prejudice and manipulation of the facts and procedural rules to conform the evidence and the court's ultimate decision to a predetermined outcome.

As a result of Kaiser defendants' discovery conduct and the court's refusal to provide plaintiff relief, plaintiff has been deprived of access to documentary evidence and evidence through interrogatory responses relevant to proof of his claims. Given the foregoing evidence of the court's bias and prejudice, the appearance is that the court effectively and sympathetically alerted Kaiser defendants to withhold material evidence of discrimination in its 1/4/04 Order, and that the court is cooperating with Kaiser defendants to this end by terminating plaintiff's motions seeking sanctions and related relief, by failing to enforce its case management order requiring a privilege log, and by failing to respond to plaintiff's requests for discovery relief and for leave to file motions to compel.

A reasonable person viewing these circumstances would agree that these circumstances are fundamentally unfair to plaintiff and indicate that the court is biased and prejudiced against plaintiff and has a predisposition favoring opposing parties. The plaintiff, by such unreasonable and unfair conduct, is being subjected to a trial by ordeal by unnecessary delays, expenses, and unnecessary measures plaintiff must make to protect his procedural rights and preserve the issues of the unfairness of the proceedings for a second appeal instead using his time for preparation for trial. Plaintiff is therefore doubly prejudiced by this conduct. The circumstances are especially bad because the depletion of plaintiff's financial resources, and his chronic health problems that significantly multiply the time necessary for him to carry out his obligations in this litigation, make him especially vulnerable to becoming a victim of oppression, and make the oppressive conduct of the opposing parties and the court particularly odious.

Because of the lack of Kaiser defendants' production of documents, and the court's refusal to provide discovery relief, plaintiff is not now fairly prepared to bring a dispositive motion against Kaiser defendants or to respond to a dispositve motion from Kaiser or to go to trial. While plaintiff has substantial circumstantial evidence of Kaiser defendants' discrimination and conspiracy to discriminate from other sources, plaintiff lacks documentary evidence Kaiser defendants have withheld that, based on the circumstantial evidence of discrimination, is reasonably likely to be expected to dispositively support plaintiff's claims.

Plaintiff is also not fairly prepared to bring or respond to any dispositive motions involving the State and Sweet Home defendants or to go to trial because he lacks the Ombudsman's documents he subpoenaed, and the Janet McKenzie documents he requested from State defendants and the Beth Wells' conservatorship and other documents he subpoenaed for which work-product and attorney-client privileges and protections have been waived because both parties failed to produce a privilege log required by the court's case management order. The court has not responded to plaintiff's requests that the court order all of this information produced. Plaintiff must be given access to the evidence he requested to overcome the appearance of unfairness in this action.

Plaintiff requests that the court stay the proceedings until the discovery disputes have been fairly considered and settled in a manner consistent with the federal rules and basic due process principles, and plaintiff has received all the documents and other information he is entitled to.

Sincerely,

Tom Jensen

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dispute of material fact whether the decision to order, and approval of, the visitation restrictions were based, partly (if not completely) on Jensen's strange and dangerous conduct, as well as his siblings' genuine concern for their mother's well-being. Doc #332 at 17 ("[Plaintiff] had his visits restricted because of his own bizarre and disturbing behavior.").

Accordingly, for Jensen to survive summary judgment on these claims he was required to come forward with admissible evidence establishing an issue of fact whether misperceptions regarding his mental health were the sole basis for imposing the visitation restrictions. Jensen's proffered "evidence" establishing that his misperceived mental disability was the sole reason for his exclusion, however, falls far short of meeting this requirement.

Jensen relies upon statements made by his siblings to various state and Sweet Home defendants. Doc #344 at 25-26. For example, Peter Jensen wrote to DSS that he thought Jensen was "mentally unbalanced." Doc #311, Ex C at 1. Also, Beth Wells told Goupal that "Tom is disruptive and unbalanced." Doc #345, Ex A at 5. These are simply two representative examples of several statements, all to the same effect, made by Jensen's siblings to various defendants. Moreover, Jensen offers a letter from Monstrales to state defendants stating that "it is Tom's mental and behavioural [sic] problems that prompted him to bring [his mother] to [Kaiser's] office." Doc #311, Ex C at 3 (emphasis added). The foregoing "evidence," according to Jensen, "support[s] the strong inference that discrimination on the basis of disability was determinative of the acts and decisions of [s]tate defendants."

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United States District Court
For the Northern District of California

Doc #344 at 25.

First, all of these statements are hearsay within the meaning of FRE 802 and Jensen has made no argument that these statements are admissible under an exception to the hearsay rule. But more importantly, this evidence actually belies Jensen's assertion, as Monstrales' letter to state defendants explicitly references Jensen's "behavioral problems" (i e, his conduct), thus negating the assertion that only Jensen's perceived mental illness was at issue in imposing the visitation restrictions.

Upon viewing all of the evidence, it is beyond dispute that state defendants' actions were based in large part (if not entirely) on Jensen's bizarre conduct towards his mother and the anxious reactions this behavior elicited from his siblings. No reasonable jury could find otherwise. Accordingly, as Jensen's perceived mental disability was not the sole basis for imposing the visitation restrictions, state defendants' motion for summary judgment on Jensen's ADA and RA claims is GRANTED.

VIII

In sum, the court DENIES Jensen's motions for reconsideration (Docs #336, 338), DENIES Jensen's Rule 56(f) application (Doc #358) and GRANTS all defendants' motions for summary judgment (Docs ##322, 329, 332).

On a side note, after fours years of litigation, massive amounts of paper and numerous hours expended by all involved, the court is of the opinion that at the heart of this complicated lawsuit is a man despondent over the state of his relationship with his immediate family. It is the court's sincere hope that these

United States District Court
For the Northern District of California

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Subject: Brother Tom

From: pljense@ibm.net
To: Hopalong@tweney.com
Date: 06-07-99, 06:28:35 PM

Dear David,

I think that the only way to drop out and go sailing is to throw your computer over the side and stay out of the country.

Well, Tom is still in Fremont. He called Beth this evening and wants her and Mama to go to counseling with him regarding Mama's care (or lack of). Needless to say this freaked Beth out. So she was thinking the 3 of us could meet with Tom/counselor.

I told her no way that I would meet with Tom with a counselor. I suggested that you and I might meet with Tom alone. We need to keep Beth out of it as much as possible. So we are back to the same situation of the note that you sent me on 04/09.

I object to the concept that Tom can come into town, make accusations and judgements, and expect us to hop to and respond. (Too long a story to describe here.) My take is to just stonewall him but Don reasons that it is too easy for him to go to Social Services and file a complaint of "elder abuse" - and I have to agree with him on that. I have a call in to Ms Jones, the next door neighbor and family law specialist, on how to handle this. I am thinking of a restraining order on Tom. He has been independently bringing her to Kaiser for medical treatment of "problems" which he has dignosed, much to the distress of the Kaiser doctor. Plus, he has been causing the problems with Mama as documented in the letter from Sweet Home. Hope to hear from Ms. Jones before I close this off.

I understand you will be arriving on Friday. We can talk on Saturday and perhaps meet Tom on Sunday. I am no longer concerned about Tom's feelings on this subject. All of the rest of the siblings, plus in-laws, are in agreement with how Mama's care is being handled. Beth and I go into high blood pressure alert every time we hear from Tom. I have had it with

him
jerking me(us) around.

Well it is after 8 and Ms. Jones has not called back yet ao I will close
this off and update you later.

Peter

don't care & not concern of their mother. Tom has been Mr.Gerald and Marguerite Jensen's problem son, heart breaking to them ever since. Tom is the "family problem/trouble maker". The black sheep of the family. Its embarassing to the family since all of them are well educated and professional.

4. Upon Marguerite Jensen admission to Sweet Home; Phyllis Beth Wells made the arrangement and signed the Facility Admission agreement on behalf of all other family members, Peter Jensen, David Jensen & Allan Jensen. We never knew nor dealt with Tom Jensen for several months, probably more than a year. He was never part of the family decisions. With this fact, we always abide with Phyllis Beth Wells and Peter Jensens' decisions for the best welfare of their mother.

5. Dr Bill Jue of Kaiser Permanente and Dr. D. Jue of Fremont, Ca, strongly believed and knew that Marguerite Jensen is being cared properly. They both knew and confirmed that it is Tom's mental and personal behavioural problems that prompted him to bring Marguerite to their offices for any for inappropriate complaints and uneventful medical visits. For which he got upset with the doctors for not confirming his own made-up diagnosis. He has bothered, demanded and threatened Dr. Bill Jue. For this, Tom has been denied access to Kaiser premises, not allowed to bring Marguerite for any medical consultations. Securities are alerted on his presence to deal with him.
Enclosed a copy of Don Wells' letter regarding his conversation with Dr Jue.

The Ombudsman also came and investigated Sweet Home due to Tom's Complaints. The Family were contacted too, and conclusion of allegations was without merit. Enclosed two (2) letters from Don Wells regarding their conversations with the Ombudsman.

All the agencies involved, the family members, the medical doctors and the Ombudsman were all together against Tom's unacceptable, inappropriate behavior. We all have the duty and responsibility to protect Marguerite Jensen. So we all were working together and doing our best to protect Marguerite from detrimental effects on her mental, emotional, and physical aspect of life and give her dignity and peaceful, non-stressful life.

With all these reasons and facts mentioned with proper documentations. We strongly felt that giving us a citation was unfair, unjust, discrimanatory and wrongly accused us for not allowing our residents to have visitors.

So, we appeal that you reconsider all these reasonable facts and evidences, regarding Anita Gopaul, LPA citation of Personal Rights.

May the Lord bless you and help you make the best and right decision, to give justice and merit for people who are sincere of serving, helping and caring for people.

Sincerely yours,

Minerva Mostrales
Licensee/Administrator

Soledad Almocera
Licensee/Administrator

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Cal. Code Regs., § 87572(11)). The plaintiff reported this action to Beth Wells, but she took no action and made no comment in regard to that order.

13. The plaintiff observed that his mother appeared to have no significant signs or symptoms of asthma during his frequent visits with her at defendant SWEET HOME during 1998.

Plaintiff's Observations of Neglect of his Mother

14. During frequent visits with Mrs. Jensen beginning in April of 1999, the plaintiff observed the following circumstances of neglect of her personal and health care at defendant SWEET HOME:

15. Mrs. Jensen suffered a prolonged and untreated episode of illness characterized by episodes of severe breathing distress, chronic cough, facial features darkened by a reddish flush, a haggard and distressed appearance, weakness and fatigue, dizziness and vertigo, and confusion with light physical activity. The course of her illness spanned over three months, and during its course Mrs. Jensen coughed up a large Y-shaped mucous plug then large quantities of clear then purulent mucous. In the aftermath of her illness, Mrs. Jensen exhibited continuing signs and symptoms of breathing and other distress that she had not suffered previously.

16. The plaintiff observed negligent and improper use of and oversight of use of Mrs. Jensen's metered-dose-inhalant asthma medication by a resident caregiver of defendant SWEET HOME. The plaintiff observed a persistent white coating on his mother's tongue that was apparent for a prolonged period that the plaintiff is informed and believes was thrush, and Mrs. Jensen complained to him that she was denied her asthma medication when she felt she needed it.

17. The plaintiff observed that his mother was reacting to asthma triggers in the defendant SWEET HOME facility, and that her signs of breathing distress would improve while she was outdoors and deteriorate when she returned to said facility. Mrs. Jensen herself commented frequently on this difference in air quality and on her favorable response to the outdoor air. The plaintiff observed that his mother's room was dusty and that the dust was not cleaned week to week. The plaintiff found an accumulation of dust and debris around the wall edge of Mrs. Jensen's bed. The HEPA air filter in her room had a coating of white dust on the pre-filter.

18. The plaintiff found his mother routinely in wet diapers when he arrived for visits, and he did not observe regular visits to the toilet sponsored for her by resident caregivers of defendant SWEET HOME. The plaintiff, by attending to his mother's toileting needs himself while visiting, found that his mother was not incontinent, but could reliably hold her urine for two hours, and would tell him when she needed to go to the bathroom. The plaintiff observed that his mother did not know how to ask for assistance from resident caregivers of defendant SWEET HOME when she needed to go to the toilet. When plaintiff inquired of his mother what she did when she needed to go to the toilet when he was not present, she replied, "I forget about it."

19. The plaintiff observed the multiple reuse of previously used disposable gloves by a resident caregiver for cleaning Mrs. Jensen after her toilet activities. He observed a resident caregiver, using said previously used gloves, clean his mother after her toilet activities by dipping her gloved fingers into a jar of water and swapping Mrs. Jensen's anal area. Said caregiver, using the same gloved hand and jar of water, then swabbed her genital area in the same manner. Another similar unsanitary practice by the same caregiver was observed by the plaintiff at another time. Said caregiver has been the regular and principal caregiver for Mrs. Jensen at defendant SWEET HOME.

20. The plaintiff observed that his mother's personal hygiene was, for a prolonged period, neglected. She had body odor, greasy hair, and smelly feet. The plaintiff twice during this period found her feet covered by layers of scaled skin. Her breath was extremely fetid and her teeth and dentures were unclean. Mrs. Jensen complained to the plaintiff of a bad taste in her mouth, which caused her to spit out her food after she chewed it. She complained to the plaintiff about her dirty hair, and told him that she was afraid to express her needs in regard to her personal hygiene for fear of causing offense and suffering reprisal.

21. Mrs. Jensen complained repeatedly to the plaintiff that she had no activities or exercise, which lack concerned and distressed her. The plaintiff observed that this was a valid complaint, and that she spent virtually her entire day in idleness, and that her frailty constrained her own exercise of her interests in activity, and that assistance in that regard was necessary and not provided for.

22. In the midst of these observations by the plaintiff, and before he became aware of the total

scope of the neglect of his mother as related herein, Mrs. Jensen confided to him that "they do things I know aren't good for me," adding that she didn't know whether to object or to go along to avoid causing offense.

23. The plaintiff informed his mother's doctor defendant BILL JUE MD, Peter Jensen and Beth Wells, and the "Patient Representative" of defendant KAISER PERMANENTE MEDICAL OFFICES - MILPITAS of his mother's health care needs, of the neglect of her care he had observed, and of Mrs. Jensen's expressions of dissatisfaction with the circumstances of her care. The plaintiff's activities in that regard, and said defendants' responses to the plaintiff's information are more fully described below.

Plaintiff's Attempts to Obtain Medical Treatment for his Mother

24. The plaintiff made two visits with his mother to her doctor defendant BILL JUE MD at defendant KAISER PERMANENTE MEDICAL OFFICES - MILPITAS, the first soon after he arrived in April of 1999 after an approximate three months absence from Mrs. Jensen's presence, and after he first observed the signs and symptoms of her illness as described in paragraph 15 above. At neither visit did defendant BILL JUE MD offer any medical opinion or diagnosis to the plaintiff, or any treatment for his patient Mrs. Jensen.

25. At one of these office visits, the plaintiff informed defendant BILL JUE MD of his concern that Mrs. Jensen was reacting to asthma triggers in the defendant SWEET HOME facility, specifically mentioning that he had found an accumulation of dust and debris around the edge and under her bed. Defendant BILL JUE MD replied that he had allergies too, and that his under-bed was probably dirty as well. The plaintiff also informed said defendant that he suspected the heating system air ducts to be a source of asthma triggers for Mrs. Jensen. Said defendant replied that he didn't believe that air ducts were cleaned, and that all that needed cleaning were air filters.

26. After the second visit to said defendant, which was after Mrs. Jensen had dislodged the mucous plug from her lungs, the clear then purulent mucous that was observed by the plaintiff was expelled by her coughing.

27. Subsequent to this sign, on July 7, and about three months after he had first observed Mrs.

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RICHARD W. WIEKING
CLERK, U.S. DISTRICT COURT
NORTHERN DISTRICT OF CALIFORNIA

TOM JENSEN
P.O. Box 614
Oakland, CA. 94604
(510) 918-6667

Plaintiff in propria persona

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF CALIFORNIA
SAN FRANCISCO DIVISION

TOM JENSEN,

Plaintiff

vs.

SWEET HOME ONE CARE FACILITY, et al.,

Defendants

No. C-00-3261-VRW

DECLARATION
IN SUPPORT OF PLAINTIFF'S
OPPOSITION TO DEFENDANTS'
SUMMARY JUDGMENT MOTIONS

Date: October 28, 2004
Time: 2:00 p.m.
Place: Courtroom 5, 17th floor
Before: Honorable Vaughn R. Walker

I, Tom Jensen, declare:

1. I am the plaintiff in this action.
2. The Exhibits A and B to plaintiff's motions for summary judgment are true and correct copies of the originals.
3. All of the documents written by my hand are true and correct as to the facts and circumstances they state.
4. All the audio tape transcripts I have made of my mother's words are true and correct as to what she said.
5. I never arrived at Sweet Home before 8:00 a.m. I believed that the visiting hours were 8:00 a.m. to 5 p.m. No one ever told me otherwise and no one ever objected in my

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presence to my arriving at that hour. There was never any activity at Sweet Home when I arrived at 8:00 a.m.

6. The Dec.2, 1999 fax sent to me by Anita Gopaul is not a true and correct copy of the document I actually received.

7. I never engaged in any improper activity with my mother at Sweet Home or anywhere else.

8. The facts as I have stated them in ¶¶ 11-74 of the Second Amended Complaint are true and correct.

I declare under penalty of perjury that the foregoing is true and correct.

Dated: Oct. 7, 2004, By Tom Jensen

Tom Jensen
Plaintiff in propria persona

United States District Court
For the Northern District of California

FILED

JAN 31 2005

RICHARD W. WIEKING
CLERK, U.S. DISTRICT COURT
NORTHERN DISTRICT OF CALIFORNIA

IN THE UNITED STATES DISTRICT COURT

FOR THE NORTHERN DISTRICT OF CALIFORNIA

TOM JENSEN,

Plaintiff,

v

SWEET HOME ONE CARE FACILITY, et al,

Defendants.

_____/

No C 00-3261 VRW

ORDER

After four years of contentious litigation, an intermediate appeal to the Ninth Circuit and a literal mountain of filed documents (occupying eleven large file folders), this case has finally reached its final summary judgment phase. As the litigation currently stands, plaintiff Tom Jensen (Jensen) alleges several federal and state law causes of action against an inordinate number of defendants. Doc #311. Currently before the court are all defendants' separate motions for summary judgment. Docs ##322, 329, 332. Also before the court are Jensen's two motions for reconsideration of the court's orders denying his

Tom Jensen appeals pro se from the district court judgment dismissing his civil rights action. We have jurisdiction under 28 U.S.C. § 1291. We review de novo a dismissal for failure to state a claim. *Epstein v. Wash. Energy Co.*, 83 F.3d 1136, 1139 (9th Cir. 1996). We affirm in part and reverse and remand in part.

Jensen contends that the district court erred by dismissing his claim that his rights were violated by the restrictions placed on his visitations to his mother, a resident at Sweet Home One Care Facility. We agree.

Although the district court properly concluded that Jensen's pleadings were sufficient to allege the defendants acted under color of state law when they imposed restrictions on his visits, the district court failed to treat Jensen's allegations as true and draw all reasonable inferences in his favor when ruling on the motion to dismiss. *See Usher v. City of Los Angeles*, 828 F.2d 556, 561 (9th Cir. 1987). Because Jensen had sufficiently alleged that the private defendants were state actors, they could not unreasonably restrict his First and Fourteenth Amendment rights. In addition, Jensen alleged that his brother had falsely accused him of being disruptive. The district court improperly relied on this accusation to conclude that Jensen had failed to raise cognizable claims pursuant to the First and Fourteenth Amendments. Accordingly, the dismissal of Jensen's

SECOND REPLY TO MOTIONS TO DISMISS

Some of the matters of the motions and replies of the Defendants are inappropriate as matters relevant to motions to dismiss. It is the legal issues of "subject matter jurisdiction," "claims upon which relief may be granted," and immunity that are properly considered. Not counterclaims that are not verified or supported by facts or affidavit or amenable to reply.

For purposes of the Motions to Dismiss, the facts of the Amended Complaint should be considered as true and viewed in the light most favorable to the Plaintiff (National Abortions Federation v. Operation Rescue 8 F 3d 680, 681 (9th Cir 1993). Matters outside the pleadings of the complaint should be disregarded (FRCP 12(b)). It should be assumed that there is evidence to support the facts and the claims.

The Facts of the Amended Complaint are verified. The Plaintiff has sworn under penalty of perjury that they are true. The Facts clearly state serious neglect of the care of Mrs. Jensen and serious deterioration in her health that was not medically treated.

The Plaintiff, under these circumstances, was clearly obligated to attempt to remedy such neglect. The facts of the complaint describe those attempts and the acts of the defendants in response to his complaints of neglect of his mother.

A claim for elder abuse has not been made in this action, but elder abuse and the consequences of the Plaintiff's complaint of neglect of his mother is the context of the constitutional claims.

The family context of this action is irrelevant to consideration of the Motions to Dismiss except for the fact that it is the context

VISITATION RESTRICTIONS.

WHAT WE HAVE IS A HUNDRED ALLEGATION COMPLAINT THAT HAS A LOT OF STUFF IN THERE ABOUT DETAILS REGARDING HIS MOTHER'S CONDITION AS HE SAW IT, OR AS HE ALLEGES, DETAILS REGARDING THE ELDERLY, GENERALLY AS A CLASS.

THOSE ARE NOT RELEVANT TO THE VISITATION RESTRICTIONS, AT LEAST AS FAR AS STATING A CLAIM IN HIS COMPLAINT.

WHAT I AM CONCERNED ABOUT IS THAT THE COMPLAINT NOT ONLY IS GOING TO REQUIRE A LINE-BY-LINE ANSWER, WHICH ALBEIT REQUIRE A LOT OF DENIALS, BUT I AM CONCERNED ABOUT THE EXTENT TO WHICH THE PLEADING DOES OPERATE IN THIS CASE IS GOING TO FRAME THE ISSUES FOR DISCOVERY PURPOSES AND HOW THAT'S GOING TO PLAY OUT LATER ON IN THE CASE.

SO THAT'S WHY WE PROPOSE, WE THOUGHT IT WOULD BE THE EASIEST ON THE COURT, THAT WOULD BE THE CLEAREST, NOT REQUIRE A LOT OF BRIEFING, SO ON AND SO FORTH, TO HAVE THE PARTIES SUBMIT REDACTED COMPLAINT FOR THE COURT TO REVIEW INDEPENDENTLY AND WE JUST THOUGHT THAT WOULD BE THE MOST EXPEDITIOUS AND EASIEST WAY TO PROCEED.

THE COURT: YOU AGREE WITH THAT?

MS. FLAHERTY: YES, I DO, YOUR HONOR.

THE COURT: LET'S DO THIS.

AS MR. JENSEN POINTS OUT, WE CAN'T REALLY DO ANYTHING TODAY UNTIL WE GET THE MANDATE BACK.

Doc #344 at 25.

First, all of these statements are hearsay within the meaning of FRE 802 and Jensen has made no argument that these statements are admissible under an exception to the hearsay rule. But more importantly, this evidence actually belies Jensen's assertion, as Monstrales' letter to state defendants explicitly references Jensen's "behavioral problems" (i e, his conduct), thus negating the assertion that only Jensen's perceived mental illness was at issue in imposing the visitation restrictions.

Upon viewing all of the evidence, it is beyond dispute that state defendants' actions were based in large part (if not entirely) on Jensen's bizarre conduct towards his mother and the anxious reactions this behavior elicited from his siblings. No reasonable jury could find otherwise. Accordingly, as Jensen's perceived mental disability was not the sole basis for imposing the visitation restrictions, state defendants' motion for summary judgment on Jensen's ADA and RA claims is GRANTED.

VIII

In sum, the court DENIES Jensen's motions for reconsideration (Docs #336, 338), DENIES Jensen's Rule 56(f) application (Doc #358) and GRANTS all defendants' motions for summary judgment (Docs ##322, 329, 332).

On a side note, after fours years of litigation, massive amounts of paper and numerous hours expended by all involved, the court is of the opinion that at the heart of this complicated lawsuit is a man despondent over the state of his relationship with his immediate family. It is the court's sincere hope that these

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differences are eventually healed or, at least, ameliorated. But it is not the job of the court to provide vengeance or leverage to siblings involved in familial disputes. The court believes that efforts to repair his tattered relationships will yield Jensen more promising results than litigation.

Accordingly, the clerk is directed to enter JUDGMENT in favor of all defendants, CLOSE the file and TERMINATE all motions.

IT IS SO ORDERED.

VAUGHN R WALKER
United States District Chief Judge

For the Northern District of California

severe and intractable pain and malaise and by the hopelessness of my situation. I spent three months on the mountain and during that period I substantially recuperated. I discovered while I was there that I had significant sinus inflammation that I was not aware of because it was masked by the malaise. I subsequently sought treatment for chronic sinus infection which was a significant step toward management of my malaise and pain symptoms, as is periodic antibiotic treatment.

11. I am informed and believe that on the basis of my experience and on the basis that my health problems have a genetic basis that my mother also needed periodic antibiotic treatment to control her symptoms. I am informed and believe on the foregoing bases that family attention to my health problems would have helped in understanding my mother's health problems and the health problems of other family members.

12. While on the mountain I had time to reflect on my family situation and realized that I had wasted my time and energy seeking help from my siblings and that to continue to seek help from them would be fruitless and harmful to me. I realized that I was entirely on my own in seeking to resolve and cope with my health problems. I resolved then out of necessity for my well-being to break my bonds with my siblings.

13. Because of my lack of a good relationship with my siblings, I did not reestablish personal contact with my parents until I learned the nature of my illness and its cause, and was able to manage my worst symptoms. I believed it would be dangerous for me to appear when I was too ill when there was no acceptance and understanding of my health problems.

14. I would not have become involved in the circumstances of my mother's care but for her obvious neglect, her entreaties for my company and protection, and by my sense of duty to her. Additionally, I was fearful for her because my siblings failure of empathy and understanding of my health problems and unwillingness or inability to communicate about them indicated that my mother was similarly at risk. I also became fearful for my mother after I observed that my father was left in wet diapers, and I unknowingly at the time, observed signs of his urinary tract infection that were ignored or went unobserved by his caretakers and Beth Wells, well before his infection became acute and required that my father be hospitalized.

care and reporting neglect.

Moving parties have failed to meet their summary judgment burden on both plaintiff's claims and moving parties defenses.

Moving parties' motions were effectively limited to discussing their affirmative defenses, and ignored plaintiff's dispositive evidence of the neglect of plaintiff's mother's personal and health care. Moving parties have not met the burden their threat defense imposes of showing that plaintiff's mother's personal and health care were not neglected and that plaintiff's supposedly threatening activities of investigating, observing and reporting the neglect of his mothers personal and health care were not warranted.

Plaintiff is entitled to judgment on Claims I and II.

Throughout the proceedings moving parties have prejudiced plaintiff by deliberately and improperly ignoring the relevance of plaintiff's verified allegations and evidence of the neglect of plaintiff's mother's personal and health care in a wrongful effort to influence the court to ignore them as well. All of the moving parties' facts bearing on the issues are now before the court and show that moving parties have a complete absence of proof of the essential elements of their defense. The essential elements of plaintiff's claims are undisputed The Court of Appeals has the authority to remand for entry of judgment in favor of plaintiff.

VI. ARGUMENT

A. THE CONDUCT OF THE PROCEEDINGS IN THE DISRICT COURT WAS UNFAIR AND OPPRESSIVE TO PLAINTIFF, AND CAUSED PLAINTIFF TO BE PREJUDICED AND TANGIBLY INJURED

INTRODUCTION

The VRW court opened its judgment opinion with a comment on the volume of the files, without offering an explicit opinion as to why they are so voluminous. It appears clear that the VRW court is improperly suggesting by innuendo that the volume of the files and the length of the proceedings are, by themselves, evidence that these things are plaintiff's fault. However, when the facts of the proceedings are fairly examined without resort to innuendo they show that

filed. No hearing was had on any motions related to the summary judgment.

Plaintiff filed a motion to file an oversize brief in this court which was granted in part. However, due to the page limitations plaintiff has been significantly hampered in presenting any issues beyond the VRW court's failure to consider plaintiff's evidence. The important issue of improper conduct throughout the proceedings causing prejudice to plaintiff that impacts the integrity and efficiency of the courts, and that is dealt with only indirectly in this brief due to the page limitation, should not be allowed to evade effective review.

IV. STATEMENT OF THE FACTS

1. PLAINTIFF'S MOTHER'S PERSONAL AND HEALTH CARE WERE NEGLECTED

(a) Plaintiff's mother's bronchitis related illness was neglected

Beginning in the winter of 1999, plaintiff's mother "suffered a prolonged and untreated episode of illness characterized by episodes of severe breathing distress, chronic cough, facial features darkened by a reddish flush, a haggard distressed appearance, weakness and fatigue, dizziness and vertigo, and confusion with light physical activity. The course of her illness spanned over three months, and during its course [plaintiff's mother] coughed up a large Y-shaped mucous plug then large quantities of clear then purulent mucous." SAC verified Facts ¶¶ 13-15 (E.R.Ex.A). And see E.R.95-96 (pgs.2-3 of plaintiff's verified 9/03/99 letter to Kaiser defendant Bill Jue MD). Sweet Home records show that plaintiff's mother had been coughing and had been given cough syrup and Tylenol for the period of 3/17/99 to 4/8/99. E.R.5-6.

After plaintiff's and his mother's first clinic visit to Kaiser defendant Jue to report these symptoms plaintiff's mother coughed up a large y-shaped mucous plug. After a second visit to Jue with no diagnosis or treatment, plaintiff's mother started to cough up large quantities of clear then purulent mucous. SAC verified Facts ¶¶ 15 and 26. Plaintiff then sought a second opinion from Dr. Derek Jue of Washington Newark Medical Group who diagnosed plaintiff's mother with bronchitis and prescribed her antibiotics which were never administered. SAC verified Facts ¶ 27. E.R.7-8 (record of 7/7/99 clinic visit). Plaintiff brought a sample of plaintiff's

rights to the elderly to oppress and retaliate against complainants; encourages and enables low standards of investigative inquiry by state agencies of oversight; and discourages and inhibits complainants from asserting and following through with justifiable claims of abuse, neglect, and denial of personal rights.

85. Federal law and legislative intent, and numerous federally sponsored reports and legislative hearings (see California Nursing Home Problems Persist, Sudocs NBR. GA 1.13: HEHS-98-202 & Betrayal; The Quality of Care in California, Sudocs NBR. Y 4.AG 4: S.Hrg. 105-735), and similar California law and legislative intent and state sponsored reports and hearings (see the "Little Hoover Commission" reports: Long Term Care: Compassion Without Confusion & The Snails Pace of Reforming Residential Care Facilities for the Elderly), and legal journal articles (see Butler, A Long-Term Health Care Strategy for Legal Services, 14 Clearinghouse Rev. 613 (1980)), indicate that this class is in need of special protection and that the problems of abuse, neglect, and denial of rights of this class have been refractory to legislative attempts at remedy. These listed sources have further stated that the interests of this class are under represented in the courts (see Cal. Welf. & Inst. Code §§ 15600 (h) & (j), and that supposedly competent institutions designed to protect and vindicate the rights of this class have consistently failed to do so. Exhibit B is adopted and incorporated in this paragraph by this reference in support of this allegation.

VI. CLAIM I

VIOLATION OF CONSTITUTIONAL RIGHTS, AND CONSPIRACY TO VIOLATE CONSTITUTIONAL RIGHTS UNDER COLOR OF STATE LAW, CUSTOM, USAGE, AND POLICY - 42 U.S.C. § 1983

[Defendants California Health and Human Services Agency (formerly known as California Health and Welfare Agency); California Department of Social Services, Community Care Licensing Division; Martha Lopez, Elaine Arrington, and Anita Gopaul ("State Defendants"), Sweet Home One Care Facility, Minerva Mostrales, and Soledad Almocera ("Sweet Home Defendants").

86. The jurisdictional allegations, paragraphs 1-10, the verified Facts (paragraphs 11-75), the General Claims (paragraphs 76-85), Claim II, and Exhibits A, B, and C are adopted and incorporated

AGENCY, as state entities receiving federal funds, are bound by the requirements of these Acts and by the Federal Regulations adopted to implement these Acts (42 U.S.C. §§ 12131, 12132, 29 U.S.C. § 794 and 42 U.S.C. § 6102 and 45 C.F.R. §§ 91.31 & 91.32).

IX. CLAIMS FOR RELIEF

Claims for Marguerite Jensen

111. Marguerite Jensen has no plain, speedy, or adequate remedy at law for neglect of her care and violation of her constitutional rights. The plaintiff, in his capacity as a concerned, immediate family member who has heard her complaints and observed and reported neglect of her personal and health care and denial of her rights, has been denied administrative appeal of the decisions and acts, as set forth in this complaint, of the agents of defendant COMMUNITY CARE LICENSING.

112. Wherefore, the plaintiff requests that the following relief be granted to Marquerite Jensen:

(a) That a preliminary injunction be issued voiding the "Visitation Restrictions for Tom Jensen," and prohibiting further neglect of Mrs. Jensen's personal and health care and personal rights by the defendants, and their agents, employees, or associates.

(b) That the court declare the "Visitation Restrictions for Tom Jensen" to be null and void, and a violation of Mrs. Jensen's federal constitutional rights (First and Fourteenth Amendments), and the California Code of Regulations title 22 § 87572(11).

(c) That a permanent injunction be issued against the defendants and their agents, employees, or associates, enjoining them from further violations of state law and regulations, and from

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CERTIFICATE OF COMPLIANCE

The attached Petition for rehearing of denial of Petitioner's writ of certiorari presents substantial grounds not previously presented and is presented in good faith and not for delay.

I declare under penalty of perjury under the laws of the United States that the foregoing is true and correct.

Executed on: Feb. 2, 2009, By: Tom Jensen

Tom Jensen,
Petitioner in propria persona,
P.O. Box 614
Oakland, CA 94604